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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

By R. M. STOVER,
REPORTER.

VOLUME LV.

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PRACTICE REPORTS.

SUPREME COURT.

ASAPH D. MATHER and JOSHUA MATHER agt. SAMUEL H.
HANNAUR.

Order of arrest — Complaint — Construction of section 558 of Code of Civil Procedure — section 561 — Omission of attorney's signature, an irregularity which may be amended — sections 559-562 — Omission to serve copy of undertaking at time of arrest — effect of.

Facts independent of the cause of action, entitling a party to an order of arrest, should be stated on affidavit, and should not be stated in the complaint.

The only true construction to be put upon the last clause of section 558 of the Code of Civil Procedure is, that if the complaint served after obtaining the order of arrest should be for a case not mentioned in sections 549 or 550, but a case or cause of action wherein no provision is made for an arrest, then the moving party would be entitled to an order setting aside the order of arrest. It was not designed to extend or alter the rule that had been established under the old Code (*Following Williams agt. Norton*, 54 *How.*, 509, and *Thompson et al. agt. Friedberg, id.*, 519; and is adverse to *Bowery National Bank agt. Duryea, id.*, 450).

That the order of arrest was not signed by the attorney, as required by section 561, is not fatal to the order of arrest. Although it is an irregularity which should not be overlooked or omitted in practice, such omission may be supplied by amendment under sections 723, 724.

Whether the name of the attorney upon the back of the order, and not at the end or face of it, would be a sufficient compliance with the provision of section 561, *quære*.

The failure to serve a copy of the undertaking upon the defendant at the time of the arrest (as would seem to be required by sections 559, 562), is only an irregularity, and does not entitle a defendant to his discharge.

Oneida Special Term, April 9, 1878.

W. A. Matteson, for plaintiff; *D. C. Stoddard*, counsel.

S. J. Barrows, for defendant.

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NOXON, J. — In this action a motion is made on the behalf of the defendant to set aside an order of arrest granted by the special county judge of Oneida county on the 9th day of February, 1878. The order of arrest was granted upon the affidavit of one of the plaintiffs, under and in pursuance of the provisions of section 549 of the new Code of Civil Procedure; and, on the same day, the summons and notice therein, as prescribed by section 419, was served personally on the defendant, and a copy of the order of arrest, and a copy of the affidavit upon which the same was granted, was also personally served upon the defendant, by the sheriff, on or about the same day; and by virtue of the order of arrest the defendant was arrested by the sheriff, and held to bail as required by the order. The order of arrest was not subscribed on its face by the attorney, as required by section 561, but on the back thereof the title of the action appeared, with the name of the plaintiffs' attorney thereunder indorsed. At the time of obtaining the order of arrest, before granting the same, the undertaking required by the judge by section 559 was given, but service of a copy thereof was not served upon the defendant with the other papers. On the 1st of March, 1878, the plaintiffs' complaint in the action was served upon the defendant's attorney who had appeared in the action. That the complaint so served was an action upon contract to recover against the defendant, as indorser, upon two promissory notes, and also to recover a sum lent and advanced by plaintiffs to defendant by allowing him to overdaw his bank account, and for the amount of which claim the plaintiffs claimed to recover judgment. That said complaint was in the usual form of a complaint on contract, and contained no facts alleged which entitled the plaintiffs to the order of arrest.

This motion was made upon affidavit of defendant's attorney and notice of motion and other papers therein referred to. The notice of motion set forth several irregularities claimed to entitle the defendant to an order setting aside the order of arrest. The most important question raised in the moving

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papers is in regard to the construction to be given to section 558 of the new Code, wherein it is provided that "at any time after the filing or service of the complaint the order of arrest must be vacated on motion if the complaint shows that *the case is not one of those* mentioned in section 549 or 550 of this act." In order to a proper construction of the language used in this section and the intention of the legislature in enacting it, it is necessary to look beyond its provision to other portions of the new Code, and also to the provisions of the old Code, of which the new Code is, in some respects what it intended to be, a revision. The revision, by the commission, of title 1 of chapter 7, articles 1 and 2, was, in a great degree, amended by the legislature in 1877. All the sections in article 1, except sections 551 and 552; in article 2, except 559, 560 and 562 to 567, were amended.

In the construction of section 558 it is important and necessary to refer to other sections of the Code relating in any way to the subject-matter of the question to be passed upon. And first of all we may examine the provision relating to a complaint and what it shall contain. There is no substantial difference between the complaint and what it shall or must contain in section 142 of the old Code and section 481 of the new. The old Code states what it *shall* contain, the new Code what it *must* contain. The contents in each are prescribed and I have been unable to find any other provision in the new Code tending in any way to allow or require the complaint to contain any statements not contained in section 481, unless section 558 shall be construed to contain such provision. The old and new Code provide for a statement of the *cause of action*, and no provision is anywhere made that facts, independent of the cause of action, shall be inserted in the complaint. The construction of the courts relating to section 142 of the old Code at first were at variance upon the question as to whether the facts relied upon to obtain an order of arrest, when such facts were independent of the cause of action, should be stated in the complaint. That question was finally disposed

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of in the court of appeals where it was held that facts, independent of the cause of action entitling a party to an order of arrest, should be stated on affidavit and should not be stated in the complaint (*Corwin* agt. *Freeland*, 6 *N. Y.*, 560; *Elwood* agt. *Gardner*, 45 *id.*, 349; 9 *Abb.* [*N. S.*], 99; *Union Bank* agt. *Mott*, 6 *Abb.*, 315). It was also held in many cases if such facts were inserted in the complaint they would be struck out on motion (15 *Abb.*, 303). In *Moak's Van Santvoord's Pleadings* (3d ed.), 253, it is stated in effect that the rule, as established by the court, may be regarded as settled and will so remain until a provision is expressly made by statute requiring the complaint to set forth the facts which the party alleges entitle him to an order of arrest. The causes of arrest depending upon the nature of the action are contained in section 549. In these cases the complaint, on its face, necessarily sets forth the cause of action. The cases mentioned in section 550, in which a defendant may be arrested, are cases where the arrest depends partly on the nature of the action and partly upon the facts, independent of the cause of action. In the case now before the court the plaintiffs proceeded under section 557 and furnished the proof by affidavit to obtain the order which was granted, and on that day defendant was arrested. Subsequently the complaint was served setting forth a cause of action on contract. The cause of arrest was not contained in the complaint and the defendant moves to set aside the order under section 558. That section contains no provision that the complaint shall set forth the facts entitling the plaintiff to the order.

It only states, "if the complaint shows that the case is not one of those mentioned in section 549 or 550," the order must be vacated. What are the cases mentioned in sections 549, 550? One of the cases is an action upon contract; and in such a case the arrest may be made when the defendant has been guilty of a fraud in contracting the liability, or has, since the making of the contract, etc., removed or disposed

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of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent.

It is quite apparent that the complaint does not show that the case is not one of those mentioned in section 550, nor does it show that it is one of those mentioned; but it is clear that the complaint shows that the action is upon contract, and the affidavits upon which the order is granted, and served upon the party, read in connection with the complaint, shows that the case is one of those mentioned in section 550. In my opinion, the only true construction to be put upon the last clause of the section is, that if the complaint served after obtaining the order of arrest should be for a case not mentioned in section 550, but a case or cause of action wherein no provision is made for an arrest, then the moving party would be entitled to an order setting aside the order of arrest. If the section should be construed in such manner that the complaint in all cases should set forth the facts authorizing the arrest, what would become of a large class of cases where the action is brought upon contract, and after issue joined the plaintiff discovered the defendant was removing or disposing of his property with intent to defraud his creditors, or was about to remove or dispose of the same with like intent. The order may be granted at any time after the commencement of the action. The plaintiff learns of the fraudulent disposition of his property by defendant, and obtains an order of arrest, shall the order be set aside because the complaint does not contain the facts, or shall the plaintiff, before obtaining the order, move to amend his complaint setting up those facts? If he attempts to so amend, the benefit to be derived from an order of arrest in such case will, in most of them, be entirely lost. It is quite evident that the party defrauding, together with his property, would be beyond the reach of his creditors before the order of arrest could be obtained. The rule of law under the old Code was, that if the complaint showed a cause of action not specified as one in which an arrest could be made or an order granted, the arrest should be vacated.

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The provision of section 558, in like manner, covers the same question. It was not designed to extend or alter the rule that had been established under the old Code. I am, therefore, clearly of the opinion that the order of arrest should not be discharged because the complaint was irregular, or for the alleged reason that the complaint showed that the case was not one of those mentioned in section 549 or 550.

The moving party claims, under section 561, that inasmuch as the order of arrest was not subscribed by the plaintiffs' attorney it should be set aside. It is also claimed that a copy of the undertaking required by the judge before granting the order should have been delivered by the sheriff to the defendant upon making the arrest. The language of sections 559 and 562 would seem to require such delivery. The undertaking is to be given before granting the order, and it is, therefore, one of the papers upon which the order is granted, and such papers are to be filed with the order of arrest within three days after bail is given, or if bail is not given within ten days after the arrest (*Secs. 577-590*). It is also claimed the order of arrest is defective in form and substance.

The claim made that the order of arrest was not signed by the plaintiffs' attorney is not fatal to the order of arrest, it was an irregularity; it should not be overlooked or omitted in practice. Under sections 723, 724 of the new Code errors and mistakes of this character may be amended. An amendment of the like character was granted under the old Code of a warrant of attachment. The warrant was allowed to be amended by supplying the omission of the signature of the attorney (*Kissam agt. Marshall, 10 Abb. Pr., 424; Genin agt. Tompkins, 12 Barb., 265*). Such omission of the signature of the attorney in this case may be supplied by amendment.

The order of arrest was, in form and substance, as required by the five hundred and sixty-first section of the Code. It only omitted the signature of the attorney. The attorney's name was upon the back of the order and not at the end or face of it. In *Burrows agt. Norton (2 Hun, 550)* it was held

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that where the signature of an attorney to a notice of appeal from a justice's judgment was upon the back of the notice it was sufficient. As to the service of a copy of the undertaking of plaintiff upon the defendant at the time of the arrest it was the duty of the sheriff to make such service. This provision is new. Under the old Code (*sec.* 184) a copy of the order of arrest and the affidavit was to be served upon defendant, and it was held that a failure to serve a copy of the affidavit was only an irregularity which would not entitle defendant to his discharge (*Barker agt. Cook*, 25 *How.*, 190; *Same case*, 40 *Barb.*, 254). In the last case the court held that the provision of the old Code requiring the sheriff to deliver a copy of the *order and affidavit* to defendant on arresting him is merely directory. There is less necessity in the provision requiring a delivery of a copy of the undertaking. That with the other papers is to be filed, and it must be given to secure costs and damages, not less than \$100. The defendant having received a copy of the affidavit and order of arrest, and his attorney afterwards having received a copy of the complaint, was actually in possession of all the papers necessary to protect the defendant in his rights, except the undertaking which was on file. I have examined the points presented in this case with much care for the reason that at this same court the principal question has been presented in several other cases. My attention has also been called to a reported case in volume 54 of *Howard's Practice Reports* (*No.* 5, *p.* 450) where the court has arrived at a different conclusion upon the construction of the language used in section 558. I regret that I am not able to coincide with the justice who gave the opinion in that case. But our differences are of little moment when we consider that the construction of this section must be passed upon by the general term.

The plaintiff is entitled to an order denying the motion to set aside the order of arrest, and also to amend the order of arrest by affixing thereto the name of his attorney.

The question is new and no costs should be allowed to either party.

Brown agt. The Mayor.

SUPREME COURT.

No. 1.

EPHRAIM D. BROWN, as president, &c., agt. THE MAYOR, &c.,
OF NEW YORK.

Nonsuit — when would do a grievous wrong — when cause should be opened for further evidence.

General usage, long continued and unquestioned, among public officers in matters pertaining to the discharge of their duties is of great force, and the practical construction thus given to the law has much of the weight of judicial decision.

The action is for work done for the city of New York in the repair of sewers, and was ordered by the commissioners of public works, under the act of 1871 (*chapter 220*). The defendant insisted that the act of 1871 was repealed by chapter 335 of the Laws of 1873; and that as the work had not been done by contract, as provided by section 91 of said latter act, the plaintiff could not recover.

Held, that, as the city of New York had had the benefit of the labor and materials of the plaintiff's assignor, and as they were worth the price charged (which was admitted on the trial), and as the city had paid a part of the claim, a nonsuit, even though it followed the statute, would do a grievous wrong.

Held, further, that, in view of the difficulty created as to the legislative intent in these various statutes (in relation to work to be done for the city of New York), upon which subject the practice of the city officers since 1873, and the character of the work done by the assignor of the plaintiffs, will throw great light, the proper course is to open the cause for the reception of additional evidence, so that every fact bearing upon the construction of these statutes, on which this action depends, may be fully considered.

New York Circuit, March, 1877.

TRIAL by the court without a jury.

Brown agt. The Mayor.

John H. Strahan, for plaintiff.

A. J. Requier, for defendant.

WESTBROOK. *J.* — Upon the trial of this cause, which involved work done for the city of New York in the repair of sewers, and ordered by the commissioners of public works of said city, the defendant insisted that the act of 1871 (*chap.* 220), under which it had been ordered, was repealed by chapter 335 of the Laws of 1873, entitled "An act to reorganize the local government of the city of New York;" and that as the work had not been done by contract, as provided by section 91 of said latter act, the plaintiff could not recover.

As the city of New York has had the benefit of the labor and materials of the plaintiff's assignor, and as they were worth the price charged (this was admitted on the trial), and as the city had paid a part of the claim, a nonsuit, even though it followed the statute, would do a grievous wrong. Further examination of the statutes reveals the fact that, by chapter 493 of the Laws of 1875, the act of 1871, under which the plaintiff seeks a recovery, was expressly repealed; and by the second section thereof, though it was passed June 5, 1875, it is declared that the repealing act shall "take effect on the first day of January, eighteen hundred and seventy-six." It is clear, then, that the legislature assumed, at least, that until that date (January 1, 1876) the act of 1871 was in force. It may also be plausibly argued, at least, that the act prescribing the period of the commencement of the life of the repealing act is, by necessary implication, a continuance of that which is so repealed until that date.

In *Easton agt. Pickersgill* (55 *New York*, 310, 315), it was held, "general usage, long continued and unquestioned, among public officers, in matters pertaining to the discharge of their duties, is of great force, and the practical construction thus given to the law has much of the weight of judicial decision." What the practice of the city of New York has been since

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the passage of the act of 1873, except with the assignor of the plaintiff, does not appear. If it was in conformity with that pursued towards him, it would be of great weight in determining the question before us.

In *People agt. Flagg* (17 N. Y., 584), and in *Peterson agt. The Mayor* (*id.*, 449), and in various other cases (*The Farmers' Loan and Trust Company agt. The Mayor*, 4 Bos., 89; *McLaren agt. The Mayor*, 1 Daly, 246; *The Harlem Gas-Light Company agt. The Mayor*, 33 N. Y., 324), it has been held that general and broad words requiring work to be done by contract should sometimes, depending upon the nature and character of the service, have a restricted meaning. What the particular work done to sewers, and for which compensation was sought in this action, was, does not appear. It may have been of a kind to do which under contract would have been, in view of pressing needs, and danger to the city as well as to its inhabitants, utterly impracticable; and that fact, if it existed, ought to be shown, and might have great weight in the ultimate disposition of the cause.

In view, then, of the fact that chapter 220 of the Laws of 1871, under which the plaintiff claims to recover, and which the defendants insist was repealed, by implication, by chapter 335 of Laws of 1873, was expressly repealed by chapter 493 of the Laws of 1875, which repealing act, by its uttered words, was to take effect January 1, 1876, and, therefore, not before that date; and, in view of the difficulty then created as to the legislative intent in these various statutes, upon which subject the practice of the city officers since 1873, and the character of the work done by the assignor of the plaintiff, will throw great light, it is deemed the best and safest course to open this cause for the reception of additional evidence, so that every fact bearing upon the construction of these statutes, on which this action depends, may be fully considered.

Brown agt. The Mayor.

SUPREME COURT.

No. 2.

EPHRAIM D. BROWN, as president, &c., agt. THE MAYOR,
&c., OF NEW YORK.

New York city—work done on sewers—Chapter 220, Laws of 1871, not repealed by chapter 335 of Laws of 1873—Repair of sewers by contract impracticable—Laws of 1875, chapter 493.

A party is entitled to recover for labor performed and materials furnished in the repair of sewers, in the city of New York, previous to January 1, 1876, under an agreement to pay what they were reasonably worth and not under a contract fixing the price in advance of performance.

As the legislature by the act of 1875 recognized that of 1871 as still existing when the former was passed; as the city itself by its proper officers has by its practice down to January 1, 1876, declared that the latter act was still in force when the claim of the plaintiff accrued, which practice "has much of the weight of judicial decision," and as the performance of the work by contract was impracticable:

Held, that the act of 1871 was not repealed by chapter 335 of Laws 1873, entitled "An act to reorganize the local government of the city of New York," and that the plaintiff is entitled to recover.

General and broad words requiring work to be done by contract should sometimes, depending upon the nature and character of the service, have a restricted meaning.

Where the city has received the value of the claim in suit, a recovery should not be defeated upon the sole and only ground that its officers had misled a party performing honest labor, by causing it to be done in a manner prohibited by its charter.

New York Circuit, March, 1877.

On the refusal to nonsuit the plaintiff the cause was opened for the reception of additional evidence. The facts, as they appeared, are fully set forth in the opinion.

Brown agt. The Mayor.

John H. Strahan, for plaintiff.

A. J. Requier, for defendant.

WESTBROOK, *J.*—Reference is made to the former opinion filed in this action for the reasons which induced me to open this case.

The following facts now appear: 1st. That the defendant has received the full value of the work and materials sought to be recovered in this action, and has approved and ratified the claim not only by the certificates of the proper officers but also by payments on account thereof. 2d. That chapter 220 of the Laws of 1871, under which the claim is made, was expressly repealed by chapter 493 of the Laws of 1875, which latter act expressly declared that the repeal should "take effect on the first day of January, eighteen hundred and seventy-six." 3d. That up to such date (January 1, 1876), the defendant, through its officers, has uniformly treated the act of 1871 as unrepealed, and all repairs of sewers were made thereunder. 4th. That the repair of sewers by contract is impracticable.

As the legislature by the act of 1875 recognized that of 1871 as still existing when the former was passed, as the city itself by its proper officers has, by its practice, down to January 1, 1876, declared that the latter act was still in force when the claim of the plaintiff accrued, which practice (*Easton agt. Pickersgill*, 55 *N. Y.*, 310, 315) "has much of the weight of judicial decision," and as the performance of the work by contract was impracticable (*People agt. Flagg*, 17 *N. Y.*, 584; *Peterson agt. The Mayor*, *id.*, 449, and other cases cited in former opinion), my conclusion is that the act of 1871 was not repealed by chapter 335 of Laws of 1873, entitled "An act to reorganize the local government of the city of New York," and that the plaintiff is entitled to recover.

If other official duties did not severely press, a more careful and elaborate discussion would be attempted, but this and

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the former opinion explain, generally, the reasoning which has forced the conclusion stated. It is, at least, gratifying to know that a claim admitted upon the trial to have been founded upon honest work and materials, of the actual value charged, can be sustained and upheld upon, as it seems to me, sound legal principles, and the holder thereof not turned out of court, because the officials of the city, who ought to have known what its charter required, caused the labor to be performed and materials furnished under an agreement to pay what they were reasonably worth, and not under a contract fixing the price in advance of performance. In other words, when the city has received the value of the claim in suit, it would seem to be hardly fair to defeat recovery upon the sole and only ground that its officers had misled a party performing honest labor, by causing it to be done in a manner prohibited by its charter.

Matter of Brooklyn, Winfield and Newtown R. R. Co.

COURT OF APPEALS.

In the matter of the application of THE BROOKLYN, WINFIELD AND NEWTOWN RAILROAD COMPANY, appellant, to acquire the right to use the tracks of THE BROADWAY RAILROAD COMPANY, respondent.

Railroads organized under the general railroad laws, when corporate existence ceases — Laws of 1867, chapter 775, section 1 — Taking of private property for public use — what may be alleged in opposition to application.

Every corporation formed under the general laws for the formation of railroad corporations, previous to 1869, are required by the Laws of 1867 (*chapter 775, section 1*) to begin the construction of its road, and spend thereon ten per cent of its capital, within five years after its articles should be filed and recorded in the office of the secretary of state; and to finish its road and put it in operation in ten years from the time of such filing, &c., or in default thereof "its corporate existence shall cease."

The existence of the corporation is determined by the omission to comply with *either* of the prescribed conditions; and the omission to begin the construction and spend ten per cent of the capital within five years is as fatal as the failure to finish the road within the ten years.

Where, by non-performance of either of these conditions, the company forfeits or loses its corporate rights and powers, the fact may be asserted by any one whose lands or property is sought to be appropriated to the uses of the corporation under the laws authorizing the taking of private property for public use.

The company was organized February 8, 1869. It is in proof that it has not at this time (July 19, 1877) begun a construction of its road, or made any part of the expenditure required by law to be made within five years, although that period expired in February, 1874.

Held, that such proof brings it directly within the act declaring that its existence and power should cease upon that contingency.

Held, also, that the time for the performance of either of the conditions imposed by the Laws of 1867 was not extended by the several spe-

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cial acts of the legislature (*Laws of 1869, chapter 718 ; Laws of 1870, chapter 612 ; Laws of 1871, chapter 622 ; Laws of 1872, chapter 705*),

On the 25th of May, 1874, after the expiration of the time for the beginning of the work of constructing the road had passed, the legislature passed an act (*Laws of 1874, chapter 575*) declaring that the time for beginning as well as finishing the road was extended for three years from the date of the act. The three years expired May 26, 1877. The application by the company for leave to take the respondent's land was made upon a petition verified July 19, 1877.

Held, that as the company had not at the time either begun nor finished its road, its corporate existence and powers had ceased.

Held, also, that the act of 1875 (*Laws of 1875, chapter 598*), which is general, and applicable to all railroad companies within its provisions, does not apply to this company. It was not in default. It had yet, by the special act of 1874, two full years within which to complete its road, and the law of 1875 was framed for the relief of roads which were *then* in default.

January, 1878.

John H. Bergen, for appellant.

W. C. De Witt, for respondent.

ALLEN, *J.*— The company making this application was organized and became incorporated under the general laws for the formation of railroad corporations in force at the time of its organization, February 3, 1869. Every corporation formed under these laws are required by the Laws of 1867 (*chapter 775, section 1*) to begin the construction of its road, and expend thereon ten per cent of its capital, within five years after its articles should be filed and recorded in the office of the secretary of state, and to finish its road and put it in operation within ten years from the time of such filing of its articles of association ; and if it failed to begin the construction and make the expenditure named within the time limited for that purpose, or, having made such beginning and expenditures, it failed to finish and put its road in operation within the further time allowed for so doing, then, and in either case, it was declared that "its corporate existence and powers shall

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cease." The existence of the corporation was determined by the omission to comply with either of the prescribed conditions ; and the omission to begin the construction and expend ten per cent of the capital within five years was as fatal as the failure to finish the road within the ten years. The statute is not susceptible of any other reading.

If, by non-performance of either of those conditions, the company forfeited or lost its corporate rights and powers, the fact may be asserted by any one whose lands or property is sought to be appropriated to the uses of the corporation under the laws authorizing the taking of private property for public use. The legal existence of a corporation authorized to construct a railroad is at the foundation of the right to take property for its use. There must be a living or existing corporation. The petitioner alleges that it "is a corporation duly organized," &c., and this is a traversable allegation and proof that it had not performed either of the conditions of its continued existence, negatived the allegation and brought it directly within the act declaring that its existence and power should cease upon that contingency. It needed no action or judicial procedure to declare or complete a perfecture of the charter and loss of corporate powers. The statute executed itself, and the non-existence of the corporation could be alleged in opposition to this application by the respondents (*Peary agt. Calais R. R. Co.*, 30 *Maine*, 498). It was a fact that petitioner was compelled to allege, and it follows that the respondent could controvert it. It is in proof that the petitioning company has not at this time begun a construction of its road, or made any part of the expenditure required by law to be made within five years, although that period expired in February, 1874. It is claimed, however, that the corporate rights have been saved by several acts of the legislature. The statutes (*Laws of 1869, chapter 718* ; *1870, chapter 612* ; *1871, chapter 622* ; *1872, chapter 705*), all passed during the life of the corporation, recognize its existence as a corporation formed under and subject to the general laws of the state,

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and they modify its articles of association and its chartered rights by authorizing changes and extensions of its route, relieving it of some of the conditions imposed by the general laws, prescribing a modified procedure for the appraisal of damages for lands taken for its use, and permitting it to acquire the right to use the track of other railroad companies already laid upon any part of its route, upon making compensation, to be ascertained in the manner provided by law for ascertaining compensation to be made to owners for lands taken for railroad purposes. Except as modified by those several acts, the corporation was subject to the terms of its articles of association and to the general laws under which it was organized, and was relieved of none of the conditions or mandates of those laws. The time for the performance of the conditions imposed by the laws of 1867 was not extended. On the 25th of May, 1874, after the expiration of the time for the beginning of the work of constructing the road had passed, a law was enacted which revived the corporation and gave it a new existence by extending the time within which it was required by law to finish its road and put it in operation for three years from and after the passage of the act (*Laws of 1874, chap. 575.*) By this statute the condition of finishing and putting the road in operation within three years from that time was substituted for the conditions of the act of 1867, but the company was not relieved from the penalty of non-compliance with the condition as declared by the latter act. Neither condition of the law of 1867 having been performed, and the company being in default as to use, the legislature combined the two and declared that the time for beginning as well as finishing the road was extended for three years from the date of the act. The three years expired May 26, 1877. This application was made upon a petition verified July 19, 1877, and as the company had not at that time either begun and finished its road, its corporate existence and powers had ceased.

Reliance is placed upon an act passed in the following year for a further extension of time for construction of the road

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(*Laws of 1875, chap. 598*). That statute is general, and applicable to all railroad companies within its provision, and was not enacted for the benefit or relief of the appellant company, by name, as were the other acts quoted. But this company does not come within the class of companies for which that law was enacted, and within the terms of the act. It was not in default. It had yet two full years within which to complete its road, and the law of 1875 was framed for the relief of roads which were then in default. It provides that any existing railroad company theretofore organized, &c., which may have been unable from any cause to construct its road within the time specified in its charter or articles of association, shall have the time for the completion of its railroad extended for a further term of two years beyond the time heretofore limited, and that a failure to construct its railroad heretofore shall not cause a forfeiture of its corporate powers.

The failure of the appellant company to begin the construction of its road within five years, and the consequent loss of the corporate powers, was condoned by the grant and acceptance of a new and extended term, within which to complete the road, for three years from February, 1874; and it was not, and never had been, in default for not completing and putting in operation its road. It was not in need of the relief extended by the act of 1875, and was neither within the letter or spirit of the act or the intent of the legislature. It was then in life by virtue of a special act made and accepted for its relief, and had the two years of the private act which was granted to other roads not thus favored of the law of 1875, and cannot have the benefit of a general law passed for roads differently circumstanced, and for purposes inapplicable to its condition. The order must be affirmed.

All concurred; MILLER, J., absent; EARL, J., not voting.

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SUPREME COURT.

THOMAS J. HALL, surviving partner of WILLIAM HALL,
deceased, agt. OLIVER DITSON and others.

Chattel mortgage—Usury—Sale under the mortgage—purchase by mortgagee—effect of sale—action to redeem—claims of co-defendants.

Upon the loan of money to be secured by a chattel mortgage on copyrights, music plates, &c., &c., a printing contract between the parties being made at the same time, by which it was agreed that the mortgagees might print music from the plates of the mortgagor, the expense of printing and materials to be borne by the mortgagees, the profits from the music so printed to be divided equally between the parties, it appearing that the loan of the money and the printing contract were part and parcel of one general arrangement in the beginning, but were in fact made afterwards divisible, and after the mortgage was executed, and before the printing contract was made, the option was given to the mortgagors to give up the printing agreement, but they desired it to be made.

Held, that the transaction was not usurious.

Clark agt. Sheridan (47 N. Y., 188) applied.

Where a mortgagee of chattels upon a public sale makes reasonable and fair efforts to sell the property for a good price, and through the acts, statements and notices of the mortgagor at the time of sale, the effect of which is to discourage bidding, and the same does not bring a full price, a court of equity will not set aside the sale on the application of the mortgagor.

The effect of a public sale, upon due notice, under a chattel mortgage is to cut off the equity of redemption of a mortgagor.

A mortgagee, under a chattel mortgage, may himself become a purchaser on a public sale of the chattels.

In order to redeem under a chattel mortgage the mortgagor must in good faith pay or tender the whole mortgage debt, and that before suit brought.

Where the plaintiff upon a trial is not found to have just ground for equitable relief, the action cannot be held to adjust rights and claims

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between co-defendants, not related to the cause of action set up in the complaint.

Special Term, March, 1878.

THIS action is brought by the survivor of two mortgagors in a chattel mortgage to set aside a sale made under the mortgage and for a resale. The plaintiff also asked for an accounting by the mortgagees, and that upon the payment of the amount found to be due on the mortgage the plaintiff be restored to his rights to the mortgaged property. The plaintiff also claimed that an agreement, made contemporaneous with the mortgage, for the division of profits arising under a printing contract was a clog upon the mortgage and should be adjudged invalid, and that the mortgagees account for all the profits. The personal representatives of a deceased co-mortgagor were parties defendants as well as other persons who claim an interest in the mortgaged property. The personal representatives of the deceased mortgagor set up the defense of usury in the mortgage, and the other defendants interposed claims in opposition to the mortgagees.

Sullivan, Kobbe & Fowler, for plaintiff.

Estes & Barnard and *Erastus Cook*, for defendants Ditson & Co.

Charles W. Sandford, for executors, &c., of William Hall.

Edward Patterson, for James F. Hall.

VAN VORST, J.—The plaintiff claims that the printing contract, bearing even date with the chattel mortgage executed by Hall & Son to the defendants Ditson & Co., was a hard and unconscionable agreement and a clog upon the mortgage. He does not, however, urge that the transaction was usurious. The executors of the last will of William Hall,

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deceased, who are made defendants, by their answer, interpose a claim that the mortgage was usurious in its inception, the usury growing out of the advantage gained by the mortgagees through the printing contract, which, it is claimed, was part and parcel of the transaction through which the moneys were loaned, for the security of which the chattel mortgage was in part made, and that the printing contract was exacted by the mortgagees and yielded by the mortgagors, and that the transaction, in its inception, was designed to secure to the mortgagees an advantage, in the way of gain, over and above the legal interest they would realize on the loan and forbearance of the money advanced and secured by the mortgage. These defendants also claim that the vice of usury enters into the Pond mortgage, which was assigned to Ditson & Co. at the time the mortgage and printing contract above-mentioned were made and delivered.

The plaintiff claims that the agreement should be set aside as unconscionable. The executors claim that the mortgages are void for usury.

Equity will not, as is urged by the learned counsel for the plaintiff, allow a mortgagee to clog the equity of redemption with any by-agreement, and will not uphold any oppressive arrangement or advantage exacted by the mortgagee at the time of the loan of money. But a careful consideration of the evidence fails to discover any thing in the circumstances under which the printing contract was executed, hard or unconscionable on the part of Ditson & Co., or any thing, in a true sense, unfair or inequitable in the arrangement, even though it be considered as standing by itself, apart from the mortgage. It was not so regarded at the time, nor has subsequent events demonstrated it to be such.

Carried out according to its true intent, the printing contract secured rights and interests of mutual advantage.

A similar agreement had been made by Hall & Son with William A. Pond, in December, 1871, on an occasion when they borrowed money from him. No complaint appears to

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have been made at any time that such agreement was hard or unfair in its terms or operation, or that Pond had secured thereby any unfair advantage or disproportionate gain.

The fact that Hall & Son were willing, under the circumstances disclosed by the evidence, freely and of their own accord to enter into a similar arrangement with Ditson & Co., would indicate that the arrangements were by them regarded as favorable to their interests.

The evidence does, indeed, justify the conclusion that the agreement for the loan of money by Ditson & Co., and the postponement of the payment of their existing claim against Hall & Son, the payment of which was to be secured by a chattel mortgage on the music plates and copyrights, was made at the same time when the terms of the printing contract were agreed upon.

In one sense they were truly part and parcel of one general arrangement, and were, in the end, formally put in shape on the same occasion at the office of Messrs. Estee & Barnard. Yet under the evidence I cannot say that they were absolutely and unqualifiedly dependent, the one on the other.

It may well be that the fact that the printing contract was also tendered and to be executed was a controlling reason inducing Ditson & Co. to agree to make the loan and postpone payment, and to take up the Pond and Morrison mortgages. But in the end, after the Pond and Morrison mortgages had been assigned and the money paid therefor, and the mortgage to Ditson & Co. had been executed by Hall & Son, the option was distinctly and unqualifiedly left with them as to whether they would execute the printing contract, and they, without hesitation, concluded to do so.

It is suggested by plaintiff's counsel that the offer to abandon the printing contract at this time made by Ditson & Co. was neither sincere nor honest.

I do not know that we are fully justified in detracting from the offer made by Ditson & Co. the elements of sincerity and honesty.

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In making the offer Ditson & Co. may have supposed that Hall & Son would not withdraw but that they would be still willing, and perhaps claim, that the printing contract should be made, and that they should assume the responsibility of making advances under it. I think that the speech and acts of parties are entitled to be considered as springing from good and honest motives, where the facts and circumstances do not establish the contrary and that parties mean what they say. But the fact that Ditson & Co. then expressed a willingness to give up the printing contract is distinctly proven and strips the transaction of that hardness and severity which is sought to be impressed on it, if there be in fact any thing inequitable in its terms. There was a "*locus penitentiae*" for Hall & Son, and the option was tendered them of withdrawing from that part of the arrangement.

That they then expressed a *desire* for the contract is well established by the evidence, and they freely made it.

There is a fair inference to be drawn from the evidence that it was for the real advantage of Hall & Son that the printing contract with Ditson & Co. should be made. Hall & Son were in straitened circumstances; they had not the means at hand to carry on the work of printing promptly. They were then largely in arrears to the printer for work theretofore done, and encountered difficulty in discharging the obligation, and further work was to be paid for as the work was done.

Under the printing contract Hall & Son were entitled to receive one-half of the profits of all music which Ditson & Co. should print from the plates, over and above the costs and expenses of printing and materials furnished.

While I can see that such arrangement would be of advantage to Hall & Son, I am not prepared to say that one-half the profits would be an undue proportion of advantage to be realized by Ditson & Co. for their advances, care and risk in carrying out the arrangement. Hall & Son reserved to themselves the right to print for their own business from the plates.

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The arrangement was well and clearly understood, and was, without doubt, deemed to be of mutual advantage. And, when the contract was executed, Hall & Son expressed the hope that Ditson & Co. would produce and sell more music than Pond had done under his contract.

I cannot, therefore, conclude that there was any thing in the circumstances under which this contract was made, or in the contract itself, which entitles the plaintiff to any relief against it for the reasons assigned by him. It was voluntarily and understandingly entered into by them, after an experience under a similar contract made some years before with Pond, through which they had a proper comprehension of the advantages and operation of such an arrangement. There is no satisfactory evidence that it was forced upon or exacted from them. They were under no compulsion; and I fail, even now, to see why the arrangement was not of advantage to them.

I do not think that the transaction is obnoxious to the vice of usury, as is urged by the executors of William Hall, deceased. The scheme, in my opinion, from the evidence, was not resorted to by Ditson & Co. to realize more than legal interest on the loan and forbearance of money.

Although the two transactions, the loan and forbearance of money and the printing contract, were originally contemplated by the parties as parts of one general arrangement, yet they were in themselves divisible.

The loan and forbearance of the money and the printing contract are represented by separate instruments.

The mortgage secured to Ditson & Co. legal interest on the moneys secured thereby. The printing contract provided for a distribution of profits to be realized on the music printed by Ditson & Co. on the plates of Hall & Son. The material and necessary funds were to be supplied by Ditson & Co.

It was not stipulated by Hall & Son that there would be any profits. It was not an assured matter that there would be any gains. There might and might not be profits. The result

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was speculative, dependent upon the cost of production and the result of sales.

Ditson & Co., who made the advances, assumed the risk of there being sufficient sales in the end, at remunerative prices, to justify the printing.

Conceding that Ditson & Co. originally made the loan and forbearance of money dependent upon the making of the printing contract, still I do not think that such arrangement would be necessarily usurious.

The printing contract was a business operation and by its terms is not shown, in itself, to be unfavorable to Hall & Co.

The market was not at the time well supplied with their music, and it was essential to Hall & Son that it should be to maintain the value of their copyrights and plates.

Hall & Son were unable to conduct the business profitably. Ditson & Co. were responsible parties.

The printing contract might well stand on its own merits as a good and satisfactory arrangement, separate and apart from the loan of money, and as truly beneficial to Hall & Son.

This case is, in many respects, analogous to *Clark agt. Sheehan* (47 N. Y., 188), and upon the principles therein assumed the transaction is not usurious, and the same result applies to the Pond mortgage of which they took an assignment. In disposing of the claims of the plaintiff and the executors of William Hall & Son, above discussed, I cannot resist the conclusion that the interposition of Ditson & Co., at the solicitation of William Hall, was, under the evidence, timely and advantageous to Hall & Son.

They advanced the moneys, \$10,000, to relieve Hall & Son from the Pond mortgage, which was due and its payment urged. They advanced the moneys to satisfy the holder of the Morrison mortgage, and extended the payment of their own debt and made an additional loan of \$4,000.

They also took a printing contract for two years, by the terms of which Hall & Son, besides reserving to themselves the right to print from the plates for their own trade, were

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entitled to receive one-half the profits on what Ditson & Co. might print. The arrangement, as a whole and in parts, is not open to the objections urged.

I see no hardship or practical injustice in allowing to go in the transactions to be adjusted under the printing contract an item of an account in favor of Hall & Son against Ditson & Co. for music recently ordered, the gross amount of which was only then known; the amount of the printing, paper and royalty had not yet been adjusted and could not then be deducted. From its proximity, in point of time to the making of the printing contract and the character of the transaction, it was not remarkable that it should be allowed to be embraced in a settlement thereunder.

Although the terms of the printing contract did not embrace this item, yet it was competent for the parties to agree that it should be subject to its terms. They so agreed.

I have carefully considered the evidence relating to the sale of the property under the mortgages and cannot agree with the plaintiff's counsel that the same was unfairly made, or that it should be set aside by occasion of any act or omission of Ditson & Co.

I am, on the other hand, of the opinion from the evidence that the mortgagees made reasonable efforts to secure a favorable sale of the property after all attempts to adjust the matters with the plaintiff had failed.

I think that the statements made by the auctioneer and the defendant Haynes, described the property covered by the mortgages with sufficient certainty at the time of the sale.

The statement as to the number of plates was an estimate. It was not otherwise represented. But the announcement was that the entire catalogue would be sold. There were some missing plates, but Haynes stated they were useless, and it is not shown that his statements were untrue. These missing plates it was understood were not sold. Hall & Son's catalogue, which was announced to be, and which was in fact,

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sold, minus the missing plates, was well known to the music trade and by the persons attending the sale.

I do not see that any information desirable to secure a favorable sale was withheld.

It was stated by Haynes, on the sale, that the plates aggregated about 15,000, there might be one or two thousand more or less. The valuable plates and compositions were, however, within a small compass. It turns out that there were over 20,000 plates, in all, covered by the mortgage. Haynes had not counted the plates, and did not know the actual number. But the more important statement was, however, made that the whole of the catalogue would be sold, except four or five hundred pieces which could not be found, and some plates destroyed by the Boston fire. And, in respect to these, it was said that they were of little value. The number of subjects was, however, given. The plaintiff was present at the sale; he made no correction of the statement of defendant Haynes.

It cannot be said that the persons present at the sale, and who well knew the catalogue, were not sufficiently advised of what was to be sold. I think they understood the subject and what was to be sold. The weight of evidence is that they were so advised.

The efforts made by Ditson & Co. to secure the attendance at the sale of the members of the Board of Music Trade in the United States, then in session in New York, certainly was evidence of a desire on their part to secure a good sale of the property. It was evidence of an honest intention. But as much cannot be said in favor of the plaintiff and the personal representatives of William Hall, deceased. Their efforts were evidently intended to depress and defeat the sale. The statements made by them, and the claims interposed through them, had the effect to discourage bidding on the property; and if through their efforts the property did not bring a full price, I cannot see how a court of equity should interpose to aid them in setting aside the sale upon the ground that the property sold for less than its value. Through

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the character of the parties and claims interposed no other result could have been anticipated.

The plaintiff put forward a claim of his wife to a portion of the property. The defendant James F. Hall, a brother of plaintiff, interposed a claim of one-half interest in a large share of the copyrights. The executors of William Hall, deceased, objected to the sale for the reason that they had no notice thereof, and claimed it to be invalid. And one of the attorneys for the plaintiff, who appeared for some other interest, also represented that William M. Tweed had a mortgage of \$6,000, and interest, since 1870, upon the property, which could be enforced against any one who should purchase.

If the claims thus made were interposed in good faith, the property, I am satisfied, sold for more than it was really worth, subject to those claims. If the claims were not *bona fide*, it was wrong to interpose them.

The effect of the public sale under the chattel mortgages was to extinguish the outstanding equity of redemption (*Chamberlain agt. Martin*, 43 *Barb.*, 607; *Ballow agt. Cunningham*, 60 *id.*, 425; *Huggins agt. Fryer*, 1 *Lans.*, 276; *Hulsen agt. Walter*, 34 *How. Pr.*, 385).

The right of the mortgagee to purchase at the sale is recognized in *Olcott agt. Tioga Railroad Company* (20 *N. Y.*, 546). *Pulver agt. Richardson* (3 *S. C. R. [T. & C.]*, 436) appears to be the other way, and holds that a purchase by the mortgagee does not bar the mortgagor's equity of redemption. But that case rests upon *Buffalo Steam Engine Works agt. Sun Mutual Insurance Company* (17 *N. Y.*, 403). This latter case, however, as is said by SELDEN, J., in *Olcott agt. Tioga Railroad Company* (*supra*), was disposed of on other grounds. The reasons why a mortgagee should be allowed to purchase at such sale are well stated by SELDEN, J. (*See, also, same case*, 40 *Barb.*, 179).

It appears to me that, with respect to the sale we are now considering, it was manifestly the true interest of all concerned

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that the mortgagees should not have been precluded from purchasing.

From the notices and claims interposed by the plaintiff and others, above described, and which must have been designed to prevent competition and prevent a sale, it is evident that the mortgagees only would take the risk of purchasing at any thing approaching a fair price for the property.

It would have been unjust in the extreme that the mortgagees should be compelled to stand still and see the property covered by their mortgages purchased by others at a trifling sum, and in this way lose all security for their claims. There was not the slightest impediment interposed by the mortgagees, or the person conducting the sale, to bidding. Every opportunity was afforded to secure a satisfactory sale, and in the end Ditson & Co. were forced to take the property at their bid of \$10,000. They made every reasonable attempt before the property was struck down to them, by explanation through their attorney and Mr. Haynes, to meet the objections interposed, and break the force of the claims interposed, so as to invite bids, but their efforts were without avail.

The notices and claims performed their work. Ditson & Co. are not responsible for their effect. But were it otherwise and that the equity of redemption has not been extinguished by the sale, yet the mortgagees are in possession and the time for the payment of the mortgages has long since expired, the legal title in the mortgagees is complete by the terms of the instrument.

In order to redeem, the mortgagee must pay or tender the whole debt. Such payment or tender must be made or offered in good faith before suit brought (*Stoddard agt. Dennison*, 2 *Sweeny*, 54; *Halsted agt. Swartz*, 46 *How.*, 291). To enforce his equity the plaintiff must do, or offer to do, equity and that in an effective way.

It is doubtful whether this action, judged by the allegations in the complaint, is strictly an action to redeem. But if it be

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regarded as such, the failure to have made any tender before suit brought is not satisfactorily excused.

The complaint does ask for an accounting, but the facts of the case do not satisfactorily show that in order to place himself in an attitude to ask for equitable relief such accounting is necessary.

The plaintiff was himself in possession of facts sufficient to enable him to make a tender before suit brought if it was his design to redeem the property. Nor do I think that this action can be maintained for an accounting.

The evidence shows substantially that the items of profit to be distributed under the printing contract were known when any amount of printing was done, and that Hall & Son were advised thereof at the time. And again, in December, 1876, Ditson & Co. and the plaintiff went over the accounts and agreed upon a balance.

This was upon an occasion when all the matters between them was the subject of discussion preparatory to a contemplated settlement. The amount due on the mortgages was reached, as was the credits in favor of Hall & Son, from all sources. No errors are stated in the complaint with regard to the result then reached, nor do any in fact now appear. The amount of indebtedness in favor of Ditson & Co. was presumptively correct.

In an agreement, made the 29th December, 1876, between Thomas J. Hall, the plaintiff, and Ditson & Co., the amount of their claim is stated at \$21,000. This was after the examination of the accounts made by the parties. Under such circumstances, and in view of the fact that Ditson & Co. on the trial offered to relinquish their entire claim for a deficiency, amounting to \$11,000 and upwards, I cannot think the action should be retained for such purpose. Nor do I think that the action should be held to try the title of the defendant James F. Hall to any portion of the property. That is a question between James F. Hall and Ditson & Co. to be determined in an appropriate action in their behalf.

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As the plaintiff is not found to have any just ground or cause for equitable relief, the action cannot properly dispose of rights between the co-defendants not related to the causes of action disclosed in the complaint.

If the defendant James F. Hall has any claim to the property, through a title superior to that of the mortgagors, he must assert it in an independent action brought for the purpose of enforcing his claims and rights. These rights are not involved in the question whether the plaintiff may redeem by paying the mortgages, or whether the sale should be set aside for the reasons stated, or whether the plaintiff should have an account. And a result being reached adverse to the plaintiff's claims the complaint must be dismissed, with costs, without prejudice to the right of James J. Hall to take and maintain any action in the premises he may deem advisable to assert any right or claim he may have to the property, or any part thereof. And it may be that it was too late after a sale under a chattel mortgage, by which the equity of redemption of the mortgagor has been extinguished, to raise the question of usury in the original transaction, and especially in the manner in which it is interposed herein by a defendant against the claims of a co-defendant. But I deemed it advisable to disregard that objection and to consider that question in consideration with the subject to which it is in a measure kindred, although not disclosed by the complaint nor a part of the plaintiff's cause of action.

The complaint of the plaintiff is dismissed, as is that of the co-defendants of Ditson & Co. against them. The defendant will recover costs against the plaintiff, but not as to his co-defendants.

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HERKIMER COUNTY COURT.

JACOB H. BROWN agt. LEONARD BROCKETT.

Arrest — Complaint — Fraud or deceit — Warranty.

A plaintiff who fails in an *action of tort*, in which the defendant was liable to arrest, may be arrested on an execution against his person for the costs of such action.

The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, must, in substance, state the representations and aver their falsity and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade, and that they did induce such trade to the plaintiff's injury.

Where the complaint averred that the defendant sold and delivered to the plaintiff a quantity of beef at and for a price agreed upon between the parties; that the plaintiff paid to the defendant the price agreed upon; that at the time of such sale the defendant represented and warranted that said beef was good, merchantable and was that of an ox; that the said beef was not good, merchantable beef, nor was it that of an ox, but on the contrary was that of an old bull and plaintiff verily believes was diseased and unfit for any use at the time of such sale; that the fact that such beef was not fit to sell or use was well known to the defendant at the time of such sale; that the plaintiff used a small portion of said beef in his family and was made sick by the use thereof, and that the whole of said beef was utterly worthless; that by reason of the premises the plaintiff was damaged, &c., &c.:

Held, that the complaint is clear and explicit and sets out a warranty and claims and alleges a breach of the same and cannot be regarded, in form and substance, as one for fraud or deceit.

Held, further, that plaintiff could not be imprisoned on execution against the body for costs recovered by defendant in such action.

October, 1877.

THIS action was commenced in a justices' court and was tried before the justice and a jury and a verdict given for the

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plaintiff. The defendant duly appealed to the Herkimer county court and judgment of reversal, with costs, was, on the 4th day of June, 1877, entered in favor of the defendant and against the plaintiff and an execution against the property of the plaintiff was issued and returned unsatisfied. On the 26th of September, 1877, the defendant issued an execution against the body. The plaintiff was arrested on the same and confined on the limits of Herkimer county and now moves to be discharged from arrest upon the ground that it is not a case in which he could lawfully be imprisoned. The facts are stated in the opinion of the court.

H. Clay Hull, for motion.

Fred. I. Small, opposed.

AMOS H. PRESCOTT, *County Judge*. — The only question that arises in this case is as to the true construction of the complaint in the action upon which the case stands, and which is as follows:

"Plaintiff complains of defendant and shows to the court that on or about the 1st day of March, 1876, at the town of Little Falls, the defendant sold and delivered to the plaintiff a quantity of beef at and for a price then agreed upon between the parties; that the plaintiff paid to the defendant the price agreed upon for the sale of the said beef; that at the time of such sale the defendant represented and warranted that said beef was good, merchantable and was that of an ox; that the said beef was not good, merchantable beef, nor was it that of an ox, but on the contrary was that of an old bull and plaintiff verily believes was diseased and unfit for any use at the time of such sale; that the fact that such beef was not fit to sell or use was well known to the defendant at the time of such sale; that the plaintiff used a small portion of said beef in his family and was made sick by the use thereof, and that the whole of said beef was utterly worthless; that by reason of

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the premises the plaintiff was damaged to the amount of twenty-five dollars, for which amount and the costs of this action he demands judgment against the defendant."

If the complaint is in an action of warranty or contract, claiming damage for a breach of the same, then the plaintiff has been improperly imprisoned and should be discharged. On the contrary, if the gist of the action is fraud then the proceedings are lawful and regular and the motion should be denied. We are of the opinion that there can be no question in regard to the character of the complaint. It is clear and explicit and sets out a warranty, and claims and alleges a breach of the same. The words "that such beef was not fit to sell or use was well known to the defendant at the time of such sale" contained in the complaint do not change any of the features of the complaint, because the warranty or contract is alleged, and the breach also, and that is the gist of the action. Whether the clause referred to is in or out of the complaint makes no difference as to the character of the action, the complaint alleges a contract and a breach of the same. There is no averment whatever in the complaint, either in form or substance, that any false representation whatever was made by the defendant whereby the plaintiff was induced to purchase the beef mentioned in the complaint, or that any representation whatever was made by defendant with any intention on his part to deceive the plaintiff or to induce him to make the purchase, or that said plaintiff was on account of any false representations induced to purchase the beef in question, or that any false representations had any thing to do with the said contract or purchase in any way whatever. In order to frame a complaint in an action of fraud or deceit the foregoing facts must be alleged in terms or substance; and we have in this case a formal and complete complaint capable of receiving legal construction, and no construction other or different can be given to the same. The counsel for the defendant in opposition to the motion cites the case of *Miller agt. Scherder* (2 N. Y., 262), and relies upon that as authority

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to sustain the proceedings in this case. In that case there were three counts, and the case was in justices' court and the counts are blended together, and the complaint as a whole charged, in substance, that the defendant knew the meat sold to be "impure and unwholesome," and that the defendant "intending to cause the ruin of the plaintiff's health sold to him a quantity of beef as provision unfit for man to use." The court thought, in substance, "that the evil intent was substantially alleged in the complaint, which is always necessary in a case of fraud or deceit." That element does not exist in the complaint in this case. Another important distinction exists between the case under consideration and the authority referred to. In the complaint, in *Miller agt. Scherder (supra)*, no contract, consideration or promise is alleged. In this case the contract is fully alleged and set forth and is the gist of the action. In the case of *Moore agt. Noble (53 Barb., 425)* the rule is laid down, and since that has been followed, that in an action of deceit when the fraud is the gist of the action, the action cannot be sustained unless the fraud is proved. The court holds the rule to be clear and distinct in all cases and that the causes of action are different, and that fraud and warranty cannot, in any case, be united together. The case of *Executors of Evertson agt. Miles (6 Johns., 138)* establishes the doctrine that in all cases of fraud or deceit the deceit or fraud must be substantially alleged in the declaration, otherwise no proof of fraud is admissible. The same rule is laid down in the case of *Zabriskie agt. Smith (13 N. Y., 322)*. In the case of *Barber agt. Morgan (51 Barb., 116)* the cases are reviewed and the court decides "that the complaint in an action for fraud and deceit in the purchase or sale of property, induced or procured by false representations, must, in substance, state the representations and aver their falsity, and that they were made with the intent to deceive the plaintiff and induce him to make the trade or purchase in question, and that they did induce such trade to the plaintiff's injury." In *Clark agt. People (2 Lans., 334)* the court says:

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"It is undoubtedly the rule in civil cases that in an action for deceit or fraud in the sale of property, induced or procured by false representations, that the complaints must aver that the false representations were made with intent to induce the purchaser to make the trade or purchase in question, and that they did induce such sale, but it is enough if there is any thing, in substance, which amounts to an allegation of this character." Treating the complaint in this case under the well-considered rule of law as laid down in all the cases the conclusion is reached that the complaint cannot be regarded, in form or substance, as one for fraud or deceit.

The motion is therefore granted, with ten dollars costs.

Ordered accordingly.

NOTE. — Affirmed on appeal to fourth department, general term, January, 1878, on opinion of county judge. [Ed.]

Enoch Morgan's Sons' Company agt. Schwachhofer.

SUPREME COURT.

ENOCH MORGAN'S SONS' COMPANY agt. JOHN T. SCHWACHHOFER.

Trade-mark — when injunction will be granted to restrain party from imitating another's label.

No man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another.

Courts will interfere when it is apparent that there is an imitation of the plaintiffs' label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public.

Where it appeared that the plaintiffs had been for many years engaged in manufacturing *sapolio*; that the article had acquired a great reputation and that the plaintiffs had expended very large sums of money in advertising; that the defendant after analyzing a cake of *sapolio* and ascertaining how it was made set about making an article similar in character, color and appearance to that of the plaintiffs:

Held, that although he might possibly have a right to do this, yet when the court finds that the defendant after having possessed himself of the secret of the manufacture of the plaintiffs has, in addition, coined a name much resembling *sapolio* in appearance and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of *saphia* in wrappers also closely resembling the plaintiffs, both in their external and internal appearance as to color, size, and partially as to inscription and directions for use, the court has the power to interfere and should exercise its power.

Held, further, that plaintiffs are entitled to an injunction restraining the defendant from vending *saphia* in the blue package in which it is now sold.

Although it was not the intention of the court to decide that the defendant had not the right to manufacture and also sell *saphia*, nor to restrain him from the use of that name, or of the figure or device upon the label, yet it was the intention of the court that the defendant should abstain from dressing his goods in wrappers so closely resembling the plaintiffs' as to enable him to perpetrate a fraud.

Special Term, January, 1878.

Enoch Morgan's Sons' Company agt. Schwachhofer.

John Henry Hull and C. A. Seward, for plaintiffs.

Messrs. Kugelman & Stansborough, for defendant.

LAWRENCE, J. — It is quite difficult, in actions of this character, to precisely draw the line between those cases in which the plaintiff is entitled to relief and those in which relief should be denied. The decisions are conflicting, and many of them irreconcilable. But in this case, after fully considering the evidence, I am of the opinion that the plaintiffs are entitled to a portion, at least, of the relief which the complaint demands.

Upon principle no man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another. In the consideration of this case I shall lay out of view the United States statute in relation to trade-marks, because that provides that "nothing in this chapter shall lessen, impeach or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this chapter had not been enacted." I do not, therefore, regard the plaintiffs as being compelled, in order to obtain the relief they seek in this action, to show that there has been an imitation of the trade-mark which the plaintiffs have filed in the patent office. It would seem that the true rule is laid down in the case of *Edelsten agt. Vick* (23 *English L. and Eq. R.*, 51, 53), where vice-chancellor Wood, adopting the language of lord LANGDALE in *Croft agt. Day* (7 *Beavan*, 84, 87), says: "That what is proper to be done in cases of this kind depends on the circumstances of each case. * * * That for the accomplishment of a fraud in each case two circumstances are required, first to mislead the public and next to preserve his own individuality." Commenting further upon the language of lord LANGDALE, in *Croft agt. Day*, the vice-chancellor proceeds: "Now, in that case of *Croft agt. Day* there was, as

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lord LANGDALE said, many distinctions between the two labels; and in this case before me, just as in that of *Croft* agt. *Day*, anyone who takes upon himself to study the two labels will find even more marks of distinction than were noticed in argument. But in this case, as in that, there is the same general resemblance in color. Here there is the same combination of colors, pink and green. There is the same heading, 'Her Majesty's Letter Patent' and 'solid-headed pins,' and the name D. F. Taylor, with the words 'exclusively manufactured' upon the two labels, which are of precisely the same size, and the scrolls in the same form 'and exclusive patentee' in an exactly similar curved line. Nor does it rest only with the general resemblance of the outer wrappers. The papers in which the defendant's pins are stuck bear also a great similarity; they are as like as can be to the papers in which plaintiff's pins are stuck." Then, after stating that he agrees that there must be an intent to deceive the public, the vice-chancellor holds that the defendants, both in the outer and inner wrappers, made a palpable imitation with the intent to deceive the public and he accordingly restrained them. I have referred to this case at length because it seems to me to be peculiarly in point. But there are several authorities in our own courts which uphold the same doctrine. In *Williams* agt. *Spence* (25 *How. Pr.*, 307) MONELL, J., says: "The only question to be determined, therefore, in this case is whether the labels, devices and handbills used by the defendants, as set forth in the complaint, are calculated to and do deceive the public into the belief that the soap that they are selling is the soap made and sold by the plaintiffs. * * * The oral evidence that the labels, devices and handbills used by the defendants are calculated to deceive the public, also preponderates, and an inspection of the respective labels, devices and handbills satisfies me that the public would be readily deceived and purchase the defendant's soap under the belief that they were purchasing the plaintiffs." In *Lea* agt. *Wolf* (13 *Abbott [N. S.]*, p. 391) Mr. justice INGRAHAM says: "The

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color of the paper, the words used and the general appearance of the words, when used, show an evident design to give a representation of those used by the plaintiffs. It is impossible to adopt any conclusion other than that the intent was to leave purchasers, from the general appearance of the article, to suppose that it was the original Worcestershire sauce which they were buying" (*See, also, Cook agt. Starkweather*, 18 *Abbott* [N. S.], p. 292). And in *Lockwood agt. Bostwick* (2 *Daly*, p. 521) it was held, "that a party will be restrained by an injunction from using a label as a trade-mark resembling an existing one in size, form, color, words and symbols, though in many respects different, if it is apparent that the design of the imitation was to depart from the other sufficiently to constitute a difference when compared, and yet not so much so that the difference would be detected by an ordinary purchaser, unless his attention was particularly called to it and he had a very perfect recollection of the other trade-mark." And in *Kinney agt. Bach* (16 *Am. Law Register* [N. S.], p. 597) Mr. justice VAN BRUNT says: "A careful inspection of the labels in question shows, beyond a doubt, that those of the defendant were adopted in order to deceive the public when they purchased the cigarettes of the defendant's manufacture." I am satisfied, from the evidence in this case, that the intention of the defendant has been from the first to make an article as nearly as possible resembling that manufactured by the plaintiffs and to put it off upon the public as the same article. I am also satisfied that it was the intention of the defendant in adopting the blue and tinfoil wrappers, and in printing on them the directions for use in language so closely resembling that employed by the plaintiffs, to impose upon the public and to lead purchasers to believe that in purchasing the defendant's article they were in fact obtaining the sapolio of the plaintiffs. In this connection the wonderful similarity of the color of the inside of the tinfoil wrapper used by the defendant with that used by the plaintiffs should not be forgotten.

The whole case, to my mind, shows an intention on the part

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of the defendant to avail himself of the reputation which the plaintiffs had acquired in the market for their sapolio by their enterprise and ability and by the large expenditures which they had made in bringing the sapolio to the attention of the public.

It appears that the plaintiffs have been for many years engaged in manufacturing sapolio ; that the article has acquired a great reputation, and that the plaintiffs have expended very large sums of money in advertising. The evidence shows that the defendant, after analyzing a cake of sapolio and ascertaining how it was made, set about making an article similar in character, color and appearance to that of the plaintiffs. This he may possibly have a right to do, but when the court finds that the defendant, after having possessed himself of the secret of the manufacture of the plaintiffs, has, in addition, coined a name much resembling sapolio in appearance, and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of saphia in wrappers also closely resembling the plaintiffs, both in their external and internal appearance as to color, size, and partially as to inscription and directions for use, the court has, in my judgment, the power to interfere and should exercise its power. It is claimed that the plaintiffs cannot have an exclusive right to use tinfoil or ultramarine blue-colored paper in putting up their article, as such paper is much used for ordinary commercial purposes. This is true, but the cases cited show that the courts will interfere where it is apparent that there is an imitation of the plaintiff's label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. The evidence satisfies me that the blue wrapper, as used by the defendant, is calculated to deceive purchasers, and I think it is very clearly proven that the ordinary purchaser is deceived by the similarity of the dresses in which the soaps are put upon the market. A critical and careful examination of the two packages will undoubtedly reveal distinctions and differences

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between the labels, and the devices thereon are different, but there is such a general resemblance that, to borrow the language of the vice-chancellor in *Edelsten* agt. *Vick* (*supra*): "The court or jury would be bound to presume that it was not a fortuitous concurrence of events which has produced this similarity. It would be irrational not to rest convinced that this remarkable coincidence of appearance, external and internal, is the result of design." In the case of *Abbott* agt. *Bakers and Confectioners' Tea Association* (*Weekly Notes*, 1872, p. 31) an injunction had been issued restraining the defendants from issuing wrappers which were in imitation of those of the plaintiffs. On appeal the lord chancellor said: "That though no one particular mark was exactly imitated the combination was very similar and likely to deceive; that it was true that there was no proof that any one had been deceived, or that the plaintiffs had incurred any loss, but where the similarity is obvious that was not of importance." The appeal was, therefore, dismissed (*See case reported below; The Weekly Notes*, 1871, p. 207). This last case seems decisive of the question now under consideration (*See, also, Lockwood* agt. *Bostwick*, 2 *Daly*, p. 521; *Godillot* agt. *Hazard*, 49 *How.*, 10).

I am, therefore, of the opinion that the plaintiffs are entitled to an injunction restraining the defendant from vending saphia in the blue packages in which it is now sold. By this I do not mean to be understood as holding that the defendant has not the right to manufacture and also sell saphia, nor to restrain him from the use of that name, or of the figure or device upon the label, but I do intend that he shall abstain from dressing his goods in wrappers so closely resembling the plaintiffs as to enable him to deceive the public and perpetrate a fraud. That he shall not sell saphia as and for sapolio. In other words he must sell under his own colors and not under those of the plaintiffs.

Judgment accordingly.

Findings may be settled on five days' notice.

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SUPREME COURT.

THE MUTUAL LIFE INSURANCE COMPANY agt. SAMUEL H.
WILCOX and others.

*Mortgage — Release — Recording act — Latent equities — Constructive notice
by possession.*

Under the recording acts, all unrecorded instruments in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, is void and of no effect as against any subsequent mortgagee, or assignee of a mortgage, who in good faith and for a valuable consideration takes a mortgage, or an assignment of a mortgage. Equity gives no assistance against a "purchaser" for a valuable consideration without notice.

A release of part of mortgaged premises is a "conveyance" by which the title to real estate may be effected, and unless duly recorded is void against a subsequent assignee of a mortgage for value, and without notice, under the recording act.

The general rule is that where the possessor of land causes the registry of a particular title, a subsequent purchaser need not look beyond it. The purchaser has a right to assume where the possessor has put his deed on record, that he has recorded all the conveyances affecting his title.

The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case is that the occupant is holding subject to the mortgagee.

The general rule that a purchaser of a mortgage takes it subject to all latent equities existing in favor of the mortgagor, and also of third parties, relates only to those equities which are not within the scope of the recording act, and against which subsequent purchasers, *bona fide*, are thereby protected.

Special Term, February, 1878.

On February 8, 1866, the defendant S. H. Wilcox and wife gave to one David D. Houston the bond and mortgage

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described in the complaint herein to secure the payment of \$9,000, a portion of the purchase-money of the premises described in said mortgage. This mortgage was recorded in Orange county records in book 134 of mortgages, page 498, on February 12, 1866. The mortgaged premises are all situated in the county of Orange, New York. On June 30, 1868, the said Wilcox and wife, by deed dated on that day, conveyed twenty-eight feet of the mortgaged premises to Stephen S. Conkling, which deed was recorded on the 8th day of September, 1869, in said clerk's office. On June 30, 1868, said Wilcox and wife conveyed the balance of said mortgaged premises (being the part known in this action as the Erie building) to Sarah E. Slawson, by deed bearing date that day and recorded in Orange county records for deeds on July 3, 1868. On October 15, 1868, said Conkling and wife conveyed that portion of the premises deeded to him by said Wilcox (and known in this action as a part of Depot street) to the village of Middletown, by deed bearing date that day and duly recorded in Orange county records for deeds on the 8th day of September, 1869.

On July 1, 1868, \$2,000 of principal was paid on said bond to David D. Houston, the then holder and owner thereof, under an arrangement between him and the defendants, Wilcox and Conkling, by which he was to release that portion of the mortgaged premises conveyed as aforesaid by the said Wilcox and wife to said Conkling; that a release thereof was executed by the said Houston and delivered to the defendant Conkling; that the said release never was recorded, and that the said Conkling is unable to find the same now.

On March 16, 1869, said Slawson conveyed that portion of the premises known as "Erie building" to the defendant, Lewis H. Stage. His deed was recorded March 17, 1869. On August 10, 1869, the said Stage and wife conveyed the "Erie building" to Wells and Noyes. Their deed was recorded August 13, 1869. On the 12th day of December, 1871, the said Houston, for a full and valuable consideration,

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duly assigned the said bond and mortgage to the defendant, Benjamin D. Brown. Said assignment was duly recorded in the Orange county clerk's office on the first day of July, 1872, in book 183 of mortgages, page 519. On June 1, 1872, the defendant, Angeline Wells, and husband conveyed the equal undivided one-half part of the mortgaged premises, known as the "Erie building," to the defendant, Henry R. Low. Low's deed was recorded June 5, 1872. On July 2, 1872, the defendant, Benjamin D. Brown, in consideration of the sum of \$7,000 in money paid to him at that time by the plaintiff in this action, that being the exact amount then due on the said bond and mortgage, by an instrument in writing under his hand and seal and duly acknowledged, bearing date on that day, duly sold, assigned, transferred and delivered the said bond and mortgage to the plaintiff herein, which assignment was duly recorded in the Orange county clerk's office on the 12th day of July, 1872, in book 187 of mortgages, page 286; that said Brown at the time he took the assignment of the said bond and mortgage had no notice, intimation or knowledge that there was any arrangement or agreement by which said Houston was to release or had released a portion of the mortgaged premises; that the Mutual Life Insurance Company of New York, at the time it took the assignment of the said bond and mortgage, paid the said Brown in cash \$7,000, the exact amount then due thereon; had no notice or knowledge that there was any arrangement or agreement by which any portion of the mortgaged premises was to have been released or had been released from the lien of the said mortgage; that at the time the said plaintiff took the said mortgage from the said Brown it caused an official search to be made of all the premises described in said mortgage from the date of said mortgage and prior thereto, up to and including the date of the assignment to them, to wit, July 2, 1872; that the said mortgage was at that time, as appears by the official search of the clerk of the county of Orange, a valid and subsisting lien upon all the premises described therein, and that no release of

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any portion thereof was by said search disclosed; that upon a foreclosure of a subsequent mortgage given upon that portion of the mortgaged premises known as the Erie building, William Vanamee, as referee, sold and conveyed all the premises mentioned and described in said last-mentioned mortgage to one Andrew B. Toulon by deed dated October 20, 1875, and duly recorded on the 5th day of January, 1876; that Andrew B. Toulon gave his bond to the plaintiff in the penal sum of \$14,000 on the 14th day of December, 1875, conditioned that he should pay the amount due on the plaintiff's bond and mortgage, with interest on demand. This bond was given as collateral to the mortgage described in the complaint herein. Andrew B. Toulon died in 1876. At the time of his death he was the owner of that portion of said premises known as the "Erie building." The last will and testament of Andrew B. Toulon was duly proven as a will of real and personal property, and the defendant, Margaret Jane Squires, was duly appointed the executrix thereof on the 27th day of October, 1876. As to who assumed and are liable for the deficiency in this action, we would refer to the printed complaint herein.

On the 9th of January, 1877, judgment was rendered for the relief demanded in the complaint herein. On the 24th day of February, 1877, Hon. John G. Wilkin, as referee, sold to the said Benjamin D. Brown that portion of the mortgaged premises known as the "Erie building" for the sum of \$5,475. On the said 24th day of February, 1877, said referee sold to the defendant, Henry R. Low, that portion of the mortgaged premises known as "Depot street" for \$1,600; that the amount due the plaintiff on the 24th day of February, 1877, was \$8,261, including costs of action, at that time.

Hulse & Finn, for plaintiff. The plaintiff is protected by the recording act against any unrecorded agreements to release, or against any unrecorded release, of a portion of the mortgaged premises. An unrecorded agreement to release or an unrecorded release as against the plaintiff, is absolutely void

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(1 *R. S.*, p. 756-762, *secs.* 1, 36, 37, 38). The term "real estate" as defined in section 36, embraces, among other things, all chattels real, except leases for a term not exceeding three years. A mortgage is a chattel real, and comes within the definition of real estate, as given in section 36 of the recording act (*Ely* agt. *Scofield*, 35 *Barb.*, 330; *Burrell's Law Dic.*, 282; *Dickerson* agt. *Tillinghast*, 4 *Paige*, 215). The term "purchaser," as defined by section 37 of recording act, includes a mortgagee, an assignee of a mortgage, a lease or other conditional estate. A mortgage on land creates a conditional estate in the premises mortgaged. The purchaser of a mortgage is a purchaser of the conditional estate created by the mortgage, as well as a purchaser of the conveyances by which that interest or estate is created (*Belden* agt. *Meeker*, 2 *Lans.*, 470; *Ely* agt. *Scofield*, 35 *Barb.*, 330; *St. Johns* agt. *Spaulding*, 1 *N. Y. S. R. [T. & C.]*, 483; *Fort* agt. *Burch*, 5 *Denio*, 187; *Vanderkemp* agt. *Sheldon*, 11 *Paige*, 29; *Belden* agt. *Meeker*, 47 *N. Y.*, 307). The term "conveyance," as defined by section 38 of the recording act, embraces every instrument in writing by which any estate or interest in real estate is mortgaged or assigned, or by which the title to real estate may be effected, either in law or equity. The assignment of a mortgage comes within the definition of a "conveyance," as used in the recording act, and may be recorded as such. By the Revised Statutes the principles of the recording act are extended to assignments of mortgages (*Vanderkemp* agt. *Sheldon*, 11 *Paige*, 38; *Belden* agt. *Meeker*, 2 *Lans.*, 470; *Ely* agt. *Scofield*, 35 *Barb.*, 330; *St. Johns* agt. *Spaulding*, 1 *N. Y. S. R. [T. & C.]*, 483; *Jackson* agt. *Van Valkenburgh*, 8 *Cow.*, 260; *Crane* agt. *Turner*, 7 *Hun.*, 357). The mortgage given by Wilcox to Houston, by Houston assigned to Brown, and by Brown assigned to the plaintiff, was given for a "valuable consideration" within the meaning of the recording acts; and the plaintiff and Brown were both "bona fide" purchasers for a "valuable consideration" of the conditional estate created by said mortgage in all the premises described therein, without notice of any agreement

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to release, or of any release of a portion of the mortgaged premises, and hence, under the recording act, the release given by Houston not having been recorded at the time the plaintiff took the assignment of the bond and mortgage, is void as against the plaintiff (*Fort agt. Burch*, 5 *Denio*, 187; *Jackson agt. Van Valkenburgh*, 8 *Cow.*, 260; *St. John agt. Spaulding*, 1 *N. Y. S. R. [T. & C.]*, 483; *Delaney agt. Stearns, Ct. of Appeals*, not yet reported, argued Mar. 29, 1876, *op. by RAPALLO, J.*; *Vanderkemp agt. Sheldon*, 11 *Paige*, 29; *Wilbard on Real Estate*, 118 to 125; *Belden agt. Meeker*, 2 *Lans.*, 470; 47 *N. Y.*, 307). It is well settled that if one effected with notice convey to another without notice the latter is as much protected as if no notice had ever existed (*Jackson agt. Van Valkenburgh*, 8 *Cow.*, 260; *Jackson agt. Givens*, 8 *Johns.*, 137; *Fort agt. Burch*, 5 *Denio*, 187).

William H. Stoddard, for defendant.

PRATT, J. — My first impression was that the plaintiff had constructive notice of the title of the defendant, the village of Middletown, at the time it took the assignment of the mortgage in suit; but, upon a more careful examination of the case, I am constrained to hold that such a view is not correct.

Both the warrantee deeds referred to, from which it is claimed notice to the plaintiff must be inferred, are subsequent to the mortgage, and they contain no recitals inconsistent with the title of the mortgagee.

The general rule is, that where the possessor of land causes the registry of a particular title a subsequent purchaser need not look beyond it (4 *Kent's Com.*, 203; *sec. 179, notes*). The plaintiff, therefore, had a right to assume, since defendant had put his deed on record, that he had recorded all the conveyances of said premises affecting his title thereto.

Was the possession of the land in question of such a character as to put the purchaser of the mortgage upon inquiry?

I think not. The possession was in no way inconsistent with the rights of the mortgagee.

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The village of Middletown must be presumed to have entered into possession under its deed, which was dated long after the mortgage, and the purchaser of the mortgage, in the absence of any record to the contrary, had a right to assume that such possession was subordinate to the rights of the mortgagee.

The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case, is, that the occupant is holding subject to the mortgagee (64 *N. Y.*, 76; 20 *N. Y.*, 400; 23 *N. Y.*, 253).

I am also of opinion that the release to the defendant Conkling was a "conveyance of real estate" under the recording act. This view is sustained by the opinion of TALCOTT, J., in the case of *St. John v. Spaulding* (1 *T. & C.*, 483), and I find no case in which that doctrine is overruled (*See sec. 38, Recording Act*).

It is equally clear, upon authority, that the plaintiff was a "subsequent purchaser" of the same real estate, as defined by the same act (*sec. 37*; 46 *Barb.*, 389; 64 *N. Y.*, 22; 1 *T. & C.*, *supra*).

The proof shows that the plaintiff and its assignee purchased the mortgage in good faith and for a valuable consideration, and without any notice, actual or constructive, of the release to defendant Conkling, and the assignment to each had been duly recorded prior to the recording of the release.

It follows, therefore, that the latter instrument is void as against this plaintiff. It is true, as urged by defendant's counsel, that the plaintiff took the mortgage subject to all latent equities existing in favor of the mortgagor, and also of third parties (*Trustees v. Wheeler*, 61 *N. Y.*, 88).

But this general rule relates only to those equities which are not within the scope of the recording act, and against which subsequent purchasers, *bona fide*, are thereby protected. For example, if the plaintiff had purchased the mortgage in question, without notice of any payment thereon, it could not

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be foreclosed for more than the amount actually due, and it is permitted to have the entire premises sold in satisfaction of the amount unpaid, simply because the recording act makes the release given to discharge the lien, or a portion thereof, *void* under the facts in this case.

There are some other questions involved but it is not necessary to advert to them, as the foregoing views, if correct, are decisive. It is with much hesitation and reluctance that I have concluded to dissent from the views of the justice, as quoted by defendant's counsel, who decided the motion "to vacate the sale and to permit Conkling to defend" but, after a consideration of all the authorities referred to, and contrary to my first impression, I am led to believe that neither upon principle or authority, can the release referred to in any wise affect the title of the plaintiff to the land in dispute.

In no event, if it be true that the release in question was delivered by Conkling to the village of Middletown with the deed, can Conkling be called upon to make good his covenant of warrantee to said village, and hence he has no equity upon which to base his claim to interfere in this suit.

The plaintiff is, therefore, entitled to a decree declaring the release void as against it, and for a resale of the premises, and for costs against defendant Conkling.

Kiersted *et al.* agt. Orange and Alexandria R. R. Co. *et al.*

COURT OF APPEALS.

HENRY T. KIERSTED *et al.*, appellants, agt. THE ORANGE AND ALEXANDRIA RAILROAD COMPANY *et al.*, respondents.

Lease — when action for use and occupation does not lie — principal and agent.

An action for use and occupation does not lie against a principal where there is an outstanding lease in the name of the agent.

In such case there must be proof of an assignment of the lease in writing by the agent to the principal, or proof of a surrender of the lease by the agent and its acceptance by the landlord before he can recover.

April, 1877.

APPEAL from order of general term affirming judgment recovered on the report of a referee (*For full statement of facts see case reported in 54 How., page 29*).

E. S. Van Winkle, for appellants.

T. C. Cronin, for respondents.

ANDREWS, J. — By the lease from the plaintiffs to David C. Smith, executed on the 1st day of November, 1860, the latter became vested with a term in the demised premises commencing on that day and terminating May 1, 1863. The lease was signed and sealed by the plaintiffs and by Smith in his individual capacity, and although it recited that Smith was agent of the Virginia and Tennessee route it did not purport to be executed for or in behalf of the defendants. The covenants of the lessee in the lease were his and not those

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of the corporations which composed the lines of railroad for which he was agent. They were not bound by the lease. The only authority conferred upon Smith was to negotiate for the lease of an office for their business and to report any proposed arrangement to the several companies composing the route for their approval. And if he had been authorized to lease the premises for the defendants that authority was not executed. The form of the lease made him the lessee, and the covenants in a deed can only be enforced against the party who, upon the face of the instrument, is the covenantor, although it appears by extrinsic proof that he acted as the agent for another (*Taft agt. Brewster*, 9 *Johns.*, 334; *Stone agt. Wood*, 7 *Cow.*, 452; *Grayson agt. Lewis*, 7 *Wend.*, 26; *Briggs agt. Partridge*, *court of appeals*, *March*, 1876).

Nor would an action for use and occupation lie against Smith to recover the rent reserved by the lease. At common law assumpsit for use and occupation could not be sustained where there was an express demise. This restriction was partially removed by the statute (11 *Geo.*, 11, *C.* 19), and our statute gives this remedy to the landlord against a tenant under a parol devise or other agreement, not by deed, to recover a reasonable satisfaction for the use of the premises, and the agreement may be used as evidence of the amount of damages to be recovered (1 *Rev. St.*, 748, *sec.* 26); but when the lease is by deed the action must be upon the demise to recover the rent reserved (*Comyn Land. and Tenant*, 435; *West agt. Cartledge*, 5 *Hill* 488; *Wood agt. Wilcox*, 1 *Den.*, 37). The lease to Smith authorized the lessors to re-enter for non-payment of rent or the failure of the lessee to perform other conditions in the lease. Until a re-entry for condition broken, or a surrender of the lease, Smith was the owner of the term created thereby, and the only remedy which the plaintiffs had to recover the rent was by action upon the covenant against the lessee, or, if he had assigned the lease, against his assignee. The assignee would stand in the same position as the lessee in respect to his lia-

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bility in an action for use and occupation. This action is brought to recover of the defendants for the use and occupation of the premises from the 1st of May, 1861, to the 12th of February, 1862. The defendants, as has been shown, were not parties to or bound by the lease. It is not claimed that they were assignees. There was no written assignment, and the interest of Smith could only be transferred by writing (2 *Rev. St.*, 135, *sec.* 6), and there is no proof even of a parol agreement for the transfer of the lease to the defendants. There is no evidence of a surrender of the lease, or that the plaintiffs regarded the lease as surrendered. On the contrary, on the 31st of January, 1862, they notified Stewart, who was then in possession of the premises, that they should re-enter for non-payment of rent, and relet them under the provisions of the lease; and Stewart, soon afterwards, left the premises and the plaintiffs took possession.

In the complaint in this action the plaintiffs inserted a count upon the lease, and also for use and occupation, and it having been decided that the defendants were not liable upon the lease, they abandoned this cause of action and elected to proceed solely for use and occupation. Under these circumstances, the plaintiffs cannot claim that the lease was surrendered, and there is no basis for such a contention. It is, therefore, clear that the term vested in Smith by the lease was outstanding during the whole period for which the plaintiffs claim to recover for use and occupation in this action.

The relation of landlord and tenant created by the lease continued, and it is difficult to see how that relation could exist during the same time, in respect to the same premises, between the plaintiffs and defendants. It is well settled that the action for use and occupation can only be sustained on the ground of a subsisting tenancy between the parties (1 *T. R.*, 378; 13 *J. R.*, 489; 1 *Wend.*, 134). The entry of the defendants was not by the permission or under any arrangement with the plaintiffs. Smith occupied the premises in the business of his agency until about April 1, 1861, and then, by reason of

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sickness, left them in charge of Stewart, his clerk. The defendants, soon afterwards, appointed White as their agent to take charge of the office. The rent was paid to May 1, 1861, by Smith and Stewart, the money being furnished by the defendants. The business of the defendants in the sale of tickets was discontinued on the 20th of April, 1861; but the referee has found, and we cannot say there was no evidence to sustain the finding, that they continued to occupy the premises, by their agents, to February 12, 1862. He also found that they were the tenants of the plaintiffs from the time Smith left the possession in April, 1861, to the time the plaintiffs re-entered in February, 1862.

We are of opinion that there is no evidence to support this finding. The presumption, in the absence of evidence upon the subject, is that they entered under Smith, whose term was outstanding, and in whom the right of possession was vested by sub-tenants, no assignment having been made by him of the lease. The fact that they furnished the money to pay the rent which had accrued up to May 1, 1860, did not make them the tenants of the plaintiffs; and while they may be liable for the use and occupation of the premises after that time, this liability, if it exists, is to Smith, and not to the plaintiffs. There was no privity of contract or estate between the plaintiffs and defendants, and we see no ground upon which this action can be supported.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Robinson agt. Hatch.

SUPREME COURT.

TRARY ROBINSON agt. RUFUS HATCH.

Slander — pleading — complaint — answer — demurrer.

In an action for slander, an answer which merely avers as a defense that all the statements made by the defendant respecting the plaintiff are true, is bad.

Where the truth of the slander is relied upon as a defense, the particulars must be alleged.

Where the words uttered are actionable *per se*, no allegation of malice in the complaint is necessary, because malice will be presumed.

In such a case, although malice is alleged in the complaint, an answer setting up by way of a defense that the communications were privileged need not allege that they were made without malice.

*Special Term, January, 1875.**Weeks & Forster, for plaintiff.**Henry S. Bennett and Adolphus D. Pape, for defendant.*

VAN BRUNT, J.—This is an action for slander. The answer of the defendant sets up by way of a second defense facts tending to show that the communications which constitute the slander complained of in the complaint were privileged communications, but does not allege that they were made without malice; and, for a third defense, the defendant avers that all the statements made by the defendant respecting the plaintiff are true. A demurrer was interposed upon the part of the plaintiff to these two defenses.

The case of *Wachter agt. Quenzer* (29 N. Y., 547) seems

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to hold directly that the third defense is bad, and that where the truth of the slander is relied upon as a defense the particulars must be alleged. The ground of the demurrer to the second defense, that there is no allegation in the defense, that the communications, although privileged, were not uttered maliciously, and that as malice is alleged in the complaint, such an allegation was necessary in the second defense. No case has been cited by the plaintiff's attorney to sustain this proposition. Where the words uttered are actionable *per se*, as in this case, no allegation of malice in the complaint is necessary, because malice will be presumed; but where the communication is a privileged one, there is no presumption of malice, and it must be expressly proved to the satisfaction of the court by the plaintiff. The defendant, when he has established that the communication complained of was a privileged one, has made out a perfect defense, and must succeed unless the plaintiff shows that it was made with malice (*Van Wyke* agt. *Aspinwall*, 17 *N. Y.*, 190; *Fowler* agt. *Rowen*, 30 *id.*, 20; *Ormsby* agt. *Douglas*, 37 *id.*, 477).

This being the case, it is apparent that the defendant need not allege that which he is not called upon to prove in the first instance, in order to make out his defense. The fact that the plaintiff has alleged in his complaint that the words were uttered maliciously does not alter the question of pleading, as that allegation adds nothing to the weight of the complaint, the words themselves being actionable *per se*. The demurrer must be sustained as to the third defense and overruled as to the second.

Methodist Episcopal Church at Harlem agt. Mayor.

SUPREME COURT.

THE METHODIST EPISCOPAL CHURCH AT HARLEM agt. THE
MAYOR, &C., OF THE CITY OF NEW YORK.

*Assessment of the expense for opening and extending streets under the act of
1818 — The act of 1840 considered.*

The proceedings of the commissioners under the act of 1818, regulating the opening of streets, are judicial, and their report, when confirmed by the supreme court, is final and conclusive and cannot be reviewed for irregularity, mistake or error. The judgment of the court is conclusive as to all questions litigated or which might have been litigated in the proceeding.

An action in equity cannot be maintained to set aside or reduce assessments imposed by the commissioners in such proceedings, upon the ground that the assessments exceeded one-half of the valuation of several of the lots, as made by the assessors the preceding year, or that some of the lots had not been valued at all preceding the assessment. It was the duty of the persons affected to have appeared before the commissioners in person and interposed their objections.

First Department, Special Term, November, 1877.

DEMURRER to complaint. Action to set aside assessment for extending Madison avenue.

William C. Whitney, counsel to the corporation, for the demurrer.

Thomas Allison, counsel for plaintiff, opposed.

VAN VORST, J. — This action is brought to restrain the collection of certain assessments laid upon the plaintiff's land in proceedings for the extension of Madison avenue, from One

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Hundred and Twenty-fourth street to the Harlem river, to reduce certain of the assessments in amount, and to have it adjudged that the assessments upon two of the lots are invalid. The complaint alleges that the plaintiff owns the lots in question; that the assessments exceeded one-half of the valuation of several of the lots, as made by the assessors or tax commissioners last preceding the assessment, and that two of the lots were not valued at all preceding the assessment.

The proceedings to extend Madison avenue were taken under and in pursuance of a special act of the legislature, chapter 560, Laws of 1869, amended by chapter 220, Laws of 1872. These acts applied to the proceeding for the extension of Madison avenue, all acts in force at the time of the passage of the principal act, relating to the opening of streets and avenues in the city of New York.

The comprehensive act, chapter 86 of the Laws of 1813, regulating proceedings for opening streets, is thus made applicable to the proceedings for the extension of Madison avenue. That statute has frequently been made the subject of adjudication in the court of appeals. The proceedings of the commissioners are held to be judicial in their character, subject to review and correction in the supreme court, and in the end become a part of its judgment (*The Mayor, &c., of New York* agt. *Erben*, 38 *N. Y.*, 311). The act expressly states that the report, when confirmed, "shall be final and conclusive as well upon the mayor, aldermen and commonalty, as upon the owners, lessees, persons and parties interested therein, and entitled unto the lands, * * * and also, upon all other persons whomsoever" (*Sec. 178, chap. 86, 2 R. L.*, 1813). *In the Matter of Commissioners of Central Park* (50 *N. Y.*, 498), per ALLEN, J., in speaking of the effect of the order of confirmation of the report of the commissioners by the supreme court, it is said that the order "cannot be reviewed upon any suggestion of irregularity, mistake or error, either of law or fact."

In the Matter of Arnold (50 *N. Y.*, 26), it is said that by

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confirmation by the court, the proceedings became the judgment of the supreme court, conclusive in its character. *Dolan agt. The Mayor, &c.* (62 *N. Y.*, 472), holds "that proceedings for such assessments are conducted before the court, and its confirmation of the report of the commissioner is a judgment pronounced upon a full hearing of the parties, and conclusive in its character, as to all questions litigated, or which might have been litigated, in the proceedings."

It is, however, claimed by the learned counsel for the plaintiff that the limitation created by section 7, chapter 326, Laws of 1840, applies to proceedings for opening and extending streets, and that as to two of the lots which had not been valued by the assessors or tax commissioner the commissioners had no power to assess them to any amount, and as to the other lots they could not be assessed beyond half their value as valued by the assessors. It is contended by the learned counsel to the corporation that the act of 1840 does not apply to proceedings for opening streets, but that it is limited to proceedings instituted for grading and paving streets and kindred local improvements. I do not consider it important to decide absolutely whether or not the act of 1840 applies to assessments of the expense of extending Madison avenue among the owners of land benefited by that improvement. Assuming, however, that it does, the answer to the objection of want of jurisdiction to assess the lots of the plaintiff is, that these lots were within the limits fixed by law, rendering the property of adjacent owners liable to be assessed for benefits. The proceedings of the commissioners, duly and legally initiated, were a notice to all persons owning property within the prescribed territorial limits. For a portion of these expenses the lots in question, located within the prescribed limits, were liable to be assessed for benefits.

If there was any error or mistake made by the commissioners with respect to the amounts imposed upon the plaintiff's lots, or if for any special cause they were not liable to be assessed, it was their duty to appear in the proceeding and

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interpose the objections so that the error might be corrected in season and the rights of all protected.

I do not think that a person owning land within the limits liable to be assessed who has allowed the confirmation of the report to be made without objection should, after the lapse of years and when it is too late to make any readjustment of the expense, be allowed by action to question it. There was a fitting time for his intervention before the judgment of the court rendered the proceedings of the commissioners final and conclusive. To give favor to such action would, in effect, nullify the provisions of the act of 1813, by virtue of which the judgment is conclusive as to all questions litigated, or which might have been litigated, in the proceedings. The report of the commissioners was confirmed on the 8th day of March, 1873. There is no allegation in the complaint of any surprise, fraud or want of knowledge of the proceeding while pending. The case of *In re the Petition of Second Avenue Methodist Episcopal Church*, and *In the Matter of the Petition of Henry A. Cram*, the opinions in which, in manuscript, have been handed up, are relied upon by the plaintiff's counsel in opposition to the demurrer. But those decisions were not in respect to proceedings for street openings, and the same effect is not given by the statutes to the report of the commissioners or assessors in case of improvements of the nature of those embraced in these actions as prevails with respect to street opening proceedings. Those proceedings do not end in a judgment of the court. The case of *Dolan agt. The Mayor, &c. (supra)*, holds that the judgment rendered upon the report of the commissioners can be questioned for fraud or other circumstances, such as would authorize an action to set aside an ordinary judgment. *In Dobson agt. Pearce* (2 Kern., 165) it is said that "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law but has been prevented by fraud or accident, unmixed with any

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fault or negligence in himself or his agent, will justify an interference by a court of equity.

None of these elements exist in this case. The question of jurisdiction of the commissioners, and the court which confirmed their report, may be inquired into (*The Chemung Canal Bank* agt. *Judson*, 4 *Seld.*, 255-259). But there can be no question of the power of the commissioners over the proceedings, nor of the court to confirm and enforce it. There was no total want of jurisdiction, and when a court has jurisdiction it has a right to decide every question which occurs in the cause.

The very question raised here, and about which there is a real contention as to whether or not the provisions of the act of 1840 applied, and relieved the plaintiff in whole or in part, might well have been disposed of by the supreme court; and I think it was the policy of the statutes referred to that this question, as all others affecting persons and interests, brought into the proceeding by the commissioners' report, should have been presented and disposed of before the proceeding was finally closed, so that if any error had been committed there could have been a readjustment that justice might be done to all, and loss to the defendant and others prevented; and it may reasonably be presumed in favor of the judgment that whatever could well be urged against it was seasonably urged. *Interest reipublicae ut sit finis litium.*

I think the demurrer is well interposed, and that there should be judgment for the defendant thereon.

Sloan *et al.* agt. Waring *et al.*

SUPREME COURT.

WILLIAM E. SLOAN *et al.* agt. EDMUND WARING *et al.*

Creditor's action can only be sustained after having exhausted all legal remedies — service by publication — when allowed.

A court of equity does not intervene to enforce the payment of debts. It is only after the creditor has exhausted all the means in his power at law that he is entitled to the aid of a court of equity to discover and apply the debtor's property to satisfy his claims.

A creditor at large has no *status* in a court of equity, and the right of a judgment creditor depends upon the fact of his having exhausted his legal remedies.

- An allegation in the complaint that the plaintiffs had been unable to effect service of a summons upon Waring, sr., and that he was keeping himself concealed out of the state to avoid service of summons, fails to show that he was, at the time of the commencement of this action, a non-resident of this state, having no property within this state, and therefore under the Code and the rules of the court, not liable to be served by publication or by substituted service.

Such an allegation brings the defendant within the second subdivision of section 135 of the Code of Procedure, which provides for service by publication.

Special Term, February, 1878.

EDMUND WARING and wife had separated, the wife living in a house belonging to her husband, the husband living elsewhere. The Messrs. Sloan sold carpets to Mrs. Waring and sent a bill therefor to Mr. Edmund Waring. The Sloans made inquiry elsewhere as to Waring's responsibility, but made no inquiry of Waring. Waring denied that he was liable for the purchase, and subsequent to this sale of carpets

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to Mrs. Waring, Mr. Waring conveyed several houses and lots to his son, William E. Waring. The Messrs. Sloan brought suit against Waring and his son, setting forth the sale and delivery of the carpets, alleging that they had been unable to effect service of a summons upon Waring, Sen., and that he was keeping himself concealed out of the state to avoid service of summons, and prayed to have judgment for the amount of goods sold, and that the conveyance to Waring, jr., be set aside as fraudulent as to creditors. On the trial the plaintiffs having opened their case, defendant's counsel moved to dismiss the complaint as to both Waring, junior and senior; as to Waring, jr., as not stating facts sufficient to constitute a cause of action, and as to Waring, sr., as not being within equity jurisdiction.

Edmund Coffin, Jr., for plaintiffs.

Henry H. Anderson, for defendants.

LAWRENCE, *J.*—The motion to dismiss the complaint in this action, as against William E. Waring and wife, must be granted. The plaintiffs are only creditors at large of the defendant Edmund Waring, conceding their allegations in respect to his alleged indebtedness to them to be true.

Nothing is better settled in this state than that a court of equity does not intervene to enforce the payment of debts, and that it is only after the creditor has exhausted all the means in his power, at law, that he is entitled to the aid of a court of equity to discover and apply the debtor's property to satisfy his claims. In the case of *Dunlevy agt. Tallmadge* (32 *N. Y.*, 457) the court held that a creditor at large has no status in equity, and that the right of a judgment creditor to relief depends upon the fact of his having exhausted his legal remedies without avail.

Judge WRIGHT, in delivering the opinion of the court says: "An execution must have issued on the judgment, and been

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returned unsatisfied. This is essential to the jurisdiction of the court, though there can be nothing that can be reached by execution at law."

The case of *McCartney agt. Bostwick* (32 *N. Y.*, 57), upon which the plaintiff's counsel relies, is not in point, and the distinction between that case and the present is very clearly shown by judge PORTER, in his opinion in the former case. After stating the power of the court of chancery to grant relief in cases of fraud by enforcing the rights springing from mere trusts, whether created by will, by deed or by operation of law, the learned judge proceeds to state that "the right of the party who invokes the exercise of this anterior and general jurisdiction, depends on his establishing the relation of trustee and *cestui que trust*. The right of the judgment creditor to the ancillary aid of a court of equity depends on his compliance with the statutory condition which requires him first to exhaust his legal remedy. In one case the party has no remedy at law, in the other he has none in equity until his remedies at law are exhausted."

Chief justice CHURCH, in the case of *The Ocean National Bank agt. Olcott* (46 *N. Y.*, 20), in commenting upon the case of *McCartney agt. Bostwick*, after stating that in that case the plaintiff had prosecuted the defendant to judgment and execution in Minnesota, where he resided, and then commenced an action in this state to reach property which had been paid for by the debtor and transferred to his wife, proceeds to say: "I infer from the opinions that the court declined to decide whether, in such a case, it was necessary to exhaust the legal remedies. At all events, such is the most favorable construction of the case for the plaintiff. Again he says: "The case was decided upon the ground that the plaintiffs had exhausted all available legal remedies and that the court would entertain jurisdiction by virtue of its inherent equitable powers." The case of *McCartney agt. Bostwick*, therefore, instead of disturbing the general rule which is laid down in *Dunlevy agt. Tallmadge* (32 *N. Y.*, 461), and in the numerous cases which

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that case followed (*see cases cited at pp. 460 and 461*) is, according to the construction placed upon it by the learned chief justice, entirely in harmony with that rule. Nor do I think that the plaintiffs show that Edmund Waring was, at the time this action was commenced, a non-resident of this state, having no property within this state, and therefore, under the Code and the rules of the court, not liable to be served by publication or by a substituted service. Section 135 of the Code of Procedure, which was in force at the time this action was commenced, provides "that where the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed therein with like intent," he may be served by publication. The allegation in the complaint appears to me to bring the defendant Waring within this subdivision of section 135. It amounts, in substance, to an averment that Waring departed from this state, and concealed himself without the state, for the purpose of avoiding the service of a summons or other process. If I am right in this construction of the complaint the argument of the plaintiff's counsel, based upon the theory that the defendant has so acted that no judgment at law could be recovered against him, and that, therefore, the general equitable rule before adverted to should not be applied to this case, entirely fails. The action cannot, therefore, be sustained so far as it is to be regarded as an equitable suit to set aside the conveyances made by Edmund to William E. Waring, and as to the latter defendant and his wife the complaint must be dismissed. I do not see, however, how I can dismiss the complaint as against Edmund Waring. It certainly states a good cause of action against him for goods sold and delivered.

This motion amounts to a demurrer on the ground that facts sufficient to constitute a cause of action are not stated in the complaint, and the rule in determining such cases is that if all the facts set forth constitute any right to relief the demurrer must be overruled. The cause, however, should not be tried

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at special term, it belongs to the circuit. The complaint is, therefore, dismissed as to William E. Waring and wife, but the motion as to Edmund Waring is denied, and the issue raised by the pleadings as to his indebtedness to the plaintiffs is directed to be tried at the circuit. William E. Waring and wife are entitled to their costs.

Matter of Jetter.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF PHILIP J. JETTER.

Costs in proceedings to vacate assessments.

Proceedings to vacate assessments are not special proceedings, within the purview of chapter 270 of the Laws of 1854, for the purpose of allowing costs.

It seems that the allowance of costs in proceedings of this character is contrary to the established practice of the judges of this district; and, although the court felt compelled, under the circumstances of this case, to allow certain costs and disbursements, it is not to be regarded as a precedent in reference to costs to any amount whatever.

General Term, First Department, March, 1878.

APPEAL from order denying motion to vacate judgment for costs and to retax costs.

In June, 1875, the petitioner brought a proceeding, under chapter 338 of the Laws of 1858, to vacate an assessment for paving Spring street, from Broadway to West street, alleging that the resolution and ordinance of the common council authorizing the improvement were not published prior to their adoption, as required by the charter of 1857, and that a previous assessment for paving the same street had been laid upon petitioner's property, which was duly paid.

The matter was referred to a referee to take proof. Upon the proofs, as reported by the referee, an order was granted December 22, 1875, vacating the assessment, with costs and disbursements; the amount of the assessment vacated was sixty-three dollars and forty-five cents.

The order was served on the counsel to the corporation July 19, 1876, and was certified to the comptroller September 19, 1876, as proper to be carried out. On the 21st of Sep-

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tember 1876, the petitioner's attorney served a bill of costs, with notice of taxation for the twenty-third, which was taxed on the 27th September, 1876, at the sum of ninety-two dollars and fifty-one cents (\$92.51).

Counsel to the corporation objected to the following items of costs and disbursements, viz.:

Costs for trial issue of fact.....	\$30 00
Costs for proceedings before notice of trial.....	15 00
Costs for proceedings after notice and before trial..	15 00
Referee's fees.....	25 00

All of which were, notwithstanding the objections, allowed by the clerk, and counsel to the corporation duly excepted.

On the 16th of October, 1876, the petitioner's attorney entered judgment against the mayor, aldermen and commonalty of the city of New York for the amount of the costs and disbursements taxed by the clerk.

The following are the costs and disbursements as taxed :

PETITIONER'S BILL OF COSTS.

Exc. By statute trial of issue of fact.....	\$30 00
Exc. Proceedings before notice of trial.....	15 00
Exc. Proceedings after and before trial.....	15 00

DISBURSEMENTS.

Entering order of reference.....	\$0 32
Witness' fees, asst. list.....	3 00
Witness' fees, Kirby record.....	1 50
Entering order vacating asst.....	25
Two certified copies.....	50
Entering judgment.....	1 00
Execution.....	69
Satisfaction-piece.....	25
Exc. Referee's fees.....	25 00
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Adjusted on appearance at ninety-two dollars and fifty-one cents.

Wm. C. Whitney, counsel to corporation. *J. A. Beall*, of counsel.

I. The judgment entered for the costs is absolutely without warrant in law or practice and should be set aside. The whole power of the court in these matters is derived from the statute of 1858 and the several amendments thereto. Nowhere is there an intimation of the right to enter a judgment for any purpose. The word "judgment" occurs but once, *i. e.*, in section 3, chapter 338, of the Laws of 1858, and it is evident, from the context, that it is there used in the sense of "decision" or "determination" and not in its technical sense. The matter comes into court in the form of a proceeding *in rem*. without a party defendant, and if the petition is granted the order, which is the conclusion or result of the motion, is not addressed to the mayor, aldermen and commonalty of the city of New York and does not impose any duty upon the corporation, but is addressed to certain officers of the city, the collector of assessments and comptroller, directing them to cancel the assessment. This is the substance of the order, yet the clerk, without any provision to that effect in the order, at the mere request of the petitioner's attorney, entered a judgment as if in an action against the city. Not only is the judgment entered without warrant of law but in the face of an express prohibition. "No costs, fees, disbursements or allowance shall be recovered or inserted in any judgment against municipal corporations *unless the claim, upon which such judgment is founded, shall have been presented for payment to the chief fiscal officer of said corporation before the commencement of an action thereon*" (*Sec. 2, chap. 262, Laws of 1859, p. 570*). In this case as in all cases of the same character no claim or demand was made upon the chief fiscal officer of the city of New York, but the county clerk gives judgment against the city for costs and disbursements.

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II. There is here no question of laches. The city moved to vacate promptly upon notice of the entry of judgment. No notice was given by petitioner's attorney until the 7th of November, 1877, and the motion to vacate was noticed on the twenty-first, just fourteen days after.

III. There is no authority in law for the allowance of costs against the city in proceedings to vacate assessments. The right to costs is created by statute and wholly depends upon it (*Parsons on Costs*, p. 1; *Wait's Practice*, vol. 3, 453, *et seq.*). It is not claimed that the right to costs in these matters is given by the Code but by act of 1854 (*chap.* 270), being the statute which authorizes appeals in special proceedings and which provides, at section 3, "In special proceedings and on appeals therefrom costs may be allowed in the discretion of the court, and when allowed shall be at the rate allowed for similar services in civil actions" (*Laws of 1854*, p. 593). And it is claimed that proceedings to vacate assessments are special proceedings within the meaning of the statute; that they are proceedings special and peculiar in their character, and as such, for some purposes within the description of special proceedings contained in the second and third sections of the Code, may be admitted as not material to the determination of this, but it is a question by no means free from doubt. It certainly has not been held that they are special proceedings for all purposes within the meaning of the act of 1854, and they should not be held to be such for the purpose of allowing costs. In the first place costs being the creature of the statutes, and the right to them existing only by express enactment, all statutes allowing them should be strictly construed and so as to extend only to such cases as were clearly intended by the legislature. The statute of 1854 was passed four years before proceedings to vacate assessments upon petition were known; they were first authorized by chapter 338 of the Laws of 1858. They were not the substitute for, and did not take the place of, any other proceeding or remedy, and they were not among the special proceedings intended to be affected by that act.

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The special proceedings to which the act was meant to apply were well known; they are all to be found in Crary and other works upon practice. In all the "special proceedings" then known there were two parties before the court, or if not two parties one party and an estate or fund upon which costs could be imposed. In these proceedings to vacate assessments there is but one party, the petitioner; the mayor, aldermen and commonalty are not made parties. There is no provision for the service of process or notice upon them. The only notice required to be given to any one is to the counsel to the corporation. It is not to the mayor, &c., by service upon the counsel to the corporation, but simply that a party aggrieved may apply by petition upon notice to the counsel to the corporation, and he represents the general public, the tax-payers who will be called upon to pay the amount of the assessment which may be vacated by the court rather than the corporation, and it could not have been intended to charge with the costs of a proceeding one who was not made a party to it and was not brought into court.

IV. If any costs can be allowed in these proceedings they are motion costs merely. It is claimed by the petitioner that the proceedings upon a petition to vacate an assessment are analogous to the proceedings in an action, and that costs should be allowed as in an action. In this view the clerk and the learned judge at the special term agreed, and accordingly costs were allowed for proceedings before notice of trial, for proceedings after notice and before trial, and for the trial of an issue of fact. The first and most obvious answer to this view of the subject is that no proceedings at all analogous to those had in an action occur in a proceeding of this character. It is commenced by the service of a petition, which is usually accompanied by a notice of eight days, that the petitioner will apply at a special term at chambers for the relief demanded in the petition. The matter is heard in a summary manner at the special term held for the hearing of motions, and upon *ex parte* proofs or proofs which have been taken *de bene*.

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There are no proceedings before notice of trial, and none after notice and before trial in the sense in which those terms are used in the Code. No answer, demurrer or reply, and no trial unless the hearing of every motion is a trial. For every purpose, except that of the allowance of costs, it is treated simply as a motion. The decision of the court is expressed in the form of an order not of a judgment, and an appeal from such decision is heard as a non-enumerated motion or an appeal from an order. The only particular in which these proceedings differ from ordinary motions in civil actions is that in the latter an interlocutory question is disposed of on motion and in the former the whole matter is determined, but the proceedings and the services (for which the act of 1854 says costs are to be allowed) are precisely the same as upon ordinary motions. The amount of motion costs is fixed by section 315 of the Code, and the same amount has been adopted by the courts as the measure of allowance upon appeals from orders; and no other or greater sum was intended to be allowed by the order of vacation.

V. Even if the allowance of costs in these proceedings is in the discretion of the court public policy requires that they be refused. The general term has the power to review the action of the special term in allowing costs. In *The People agt. New York Central Railroad Company*, DENIO, Ch. J., said: "An order which peremptorily and finally charges a party with the payment of a sum of money, great or small, which he ought not to pay, or with a greater amount than he ought to pay, affects his rights, not in a matter of form but in substance" (29 *N. Y.*, 422). In that case it was held that the decision of the judge at special term granting an extra allowance was reviewable by the general term. Where the matter is in the discretion of the court the discretion of the entire court, as declared by the general term, is intended (*Matter of Duff*, 10 *Abb. [N. S.]*, 416).

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E. O. Andrews, for respondent.

I. A proceeding to vacate an assessment under the special act of 1858 (*chap. 338, Laws of 1858*) is a special proceeding (*In re Bohm*, 4 *Hun*, 558; *In re Moore*, 67 *N. Y.*, 555). Judge DANIELS, who wrote the opinion in *Bohm's* case, in distinguishing cases of this nature from an action, says: "What the law provided for was, therefore, a "special proceeding, as distinguished from an action." A proceeding under chapter 86 of the Laws of 1813, to determine what compensation shall be made as damages for lands taken as streets in New York city is a special proceeding (*Matter of Canal and Walker Streets*, 12 *N. Y.*, 406; *King* agt. *The Mayor, &c.*, 36 *id.*, 182). A proceeding taken under the general railroad act (*chap. 140, Laws of 1850*) for the appointment of commissioners to appraise the value of land taken for railroad purposes is a special proceeding (*N. Y. Central R. R. Co.* agt. *Marvin*, 11 *N. Y.*, 277; see 4 *Keyes*, 59, *overruling Matter of Dodd*, 27 *N. Y.*, 629; *Rensselaer and Saratoga R. R. Co.* agt. *Davis*, 55 *id.*, 145). Costs were allowed in the last-named case, and the clerk taxed full costs as in an action. On appeal the clerk's decision was affirmed. Our case is precisely like this one. The proceedings taken in all the above cases were authorized by special laws; and it must follow that proceedings taken to vacate an assessment under the special act of 1858 is a special proceeding also. Prior to the amendment of the Code in 1866, no appeal could lie to the general term of the supreme court, nor to the court of appeals. By the act of 1866 (*sec. 11, subdivision 3 of Code*) appeals from final orders in a special proceeding were allowed to be heard at general term, and apparently in the court of appeals, for by the amendment of the Code in 1869 (*sec. 11, subdivision 3*) appeals to the court of appeals under chapter 383 of the Laws of 1858 were expressly prohibited. Thus, proceedings under the act of 1858 must of necessity be "special proceedings," or no appeal would lie either to the general term or to the court of appeals.

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II. Proceedings under the act of 1858 being "special proceedings," we are entitled to full costs and disbursements, if such are allowed in the order. By section 3, chapter 270, Laws of 1854, it is enacted :

"§ 3. In special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court ; and when allowed shall be at the rate allowed for similar services in civil actions."

When, therefore, costs and disbursements were allowed by the judge, in his discretion, at special term, we are entitled to costs to the amount that would be allowed for similar services in a civil action. The amount that would be allowed in an action has been allowed to us, and no more. It was no wish of the petitioner or his attorney that a referee was appointed by the court to take proof, but the contrary ; and it would be a great hardship on the petitioner — who, in this case, was the successful party — to have to pay out of his own pocket the referee's fees and other disbursements.

III. The appellants have been guilty of laches. The clerk taxed the costs on September 27, 1876 ; judgment was entered on October 16, 1876 ; and the motion made to retax the costs on November 21, 1877, more than one year thereafter. A motion to readjust costs should be made promptly at the first special term held for non-enumerated motions, or some reasonable excuse must be shown for the delay (*Penfield* agt. *James*, 4 *Hun*, 69 ; *Collomb* agt. *Caldwell*, 5 *How.*, 336 ; *Dresser* agt. *Wickes*, 2 *Abb.*, 460 ; *People ex rel. Lumler* agt. *Lewis*, 28 *How.* 470). It is begging the question to argue that, as the notice of entry of judgment was not given until a year after the entry of judgment, that the appellants have not been guilty of laches. The notice of entry of judgment limits the time to appeal from the judgment only, and not from the clerk's taxation of costs. No objections were taken to the disbursements, except to the referee's fee. Thus the corporation counsel admits that it is proper to enter judgment in cases of this nature.

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IV. By section 3, chapter 270 of Laws of 1854, "costs may be allowed, in the discretion of the court," in special proceedings. In this case the court has, in its discretion, allowed costs, and there is nothing before the court on this appeal to show the grounds of such discretion, and it cannot, therefore, be passed upon.

BRADY, *J.* — The petitioner applied at special term to vacate an assessment for paving Spring street, from Broadway to West street, alleging that the resolution and ordinance of the common council authorizing the improvement were not published prior to their adoption, as required by chapter 1 of the Laws of 1857; and that a previous assessment for paving the same street had been laid upon the petitioner's property, which was duly paid.

A reference was ordered to take proof of the facts; and, on the coming in of the referee's report, an order was granted vacating the assessment mentioned, with costs and disbursements. The amount of the assessment vacated was sixty-three dollars and forty-five cents.

The petitioner proceeded to tax his costs and disbursements, which consisted of the following items, amongst others: Costs of trial of issue of fact, thirty dollars; proceedings before notice of trial, fifteen dollars; costs for proceedings after notice, and before trial, fifteen dollars; referee's fees, twenty-five dollars; all of which were allowed, notwithstanding the objections of the counsel to the corporation.

It is claimed that the application of the petitioner is a special proceeding under the provisions of chapter 270 of the Laws of 1854, the third section of which declares that in special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court, and when allowed shall be at the rates allowed for similar services in civil actions. We are decidedly of the opinion that this is not a special proceeding within the purview of that statute.

It involves no issue of fact to be determined in any other

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form or mode than upon a motion, and, under provisions of the Code, a judge sitting at special term, to whom the motion is presented, may make a reference for the purpose of taking proof, or for the purpose of having the persons, whose affidavits have been presented to him for consideration, examined orally in regard to the statements there made. It is very clear, therefore, that the charge of thirty dollars for trial of issue of fact, for proceedings before notice of trial, and after notice and before trial, were not properly allowed, and should have been stricken out on the objection of the corporation counsel. A discretion having been exercised, which embraces the other items, it is not in our province to interfere with the allowance secured in that mode.

We regard the allowance of costs in proceedings of this character as contrary to the established, and now universal, practice of the judges of this district; and while we feel compelled, under the circumstances of this case, to allow the amount of the costs and disbursements already mentioned, we desire it to be understood by the profession that this is not to be regarded as a precedent in reference to costs to any amount whatever.

The costs thus stricken out could not be granted, upon the proposition that this is the case of a judgment, or resemblance to a judgment in an action, for the reason that no presentation of any claim was made to the chief fiscal officer of the corporation. The statute of 1859 (*chap. 262, sec. 2*) declares, in express terms, that no costs, fees, disbursements or allowances shall be recovered or inserted in any judgment against the corporation unless the claim upon which the same is founded was presented to the chief fiscal officer of the corporation before the commencement of the action.

We feel constrained, therefore, with the modification suggested, to affirm the order, without costs of appeal to either party.

DAVIS, P. J., and INGALLS, J., concurred.

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SUPREME COURT.

IN THE MATTER OF THE ATLANTIC MUTUAL LIFE INSURANCE
COMPANY.

Insolvent life insurance company — appointment of receiver — application by receiver for instructions — power of the court over the actuary's report.

By the eighth section of the act of 1869, entitled "An act to authorize life insurance companies to make special deposits of securities in the insurance department and to authorize the superintendent to require special reports, and also to provide for the appointment of receivers of such depositing companies in certain cases" (*Laws of 1869, chap. 902*), it is provided that if the actuary reports the corporation *solvent*, and "the actuary's report shall be confirmed by the court," the receiver *may* continue the corporate business by receiving and collecting premiums, discharging obligations, &c., &c. When, however, the actuary reports the company *insolvent* the receiver is commanded to "notify the superintendent thereof, who *shall*, with the consent and advice of the treasurer of the state, and in such manner as the said receiver, superintendent and treasurer, or a majority of them, shall determine, sell and convert such securities into money," &c. On a motion by receiver for instructions upon the actuary's report showing the company to be insolvent: *Held*, that in such case the court has no power over the actuary's report. Although, in case the actuary's report sustains the solvency of the company, it *must* be confirmed by the court before the business can be continued as the statute directs; such confirmation is not required when the actuary's report is adverse to the company's solvency.

Albany Special Term, March, 1878.

MOTION by the receiver, Mr. Edward Newcomb, upon the report of the actuary, Mr. Charles R. Knowles, for instructions.

Mr. N. C. Moak, for receiver.

Mr. S. W. Rosendale, for attorney-general.

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Mr. Wm. Barnes, for company.

Mr. George L. Stedman, for policyholders.

OPINION No. 1.

WESTBROOK, J. — Pursuant to chapter 902 of the Laws of 1869, upon the application of the attorney-general (to whom a report had been made by the superintendent of insurance as required by said act), it having, on such application, been made to “appear to the satisfaction” of this court “that the assets and funds” of the Atlantic Mutual Life Insurance Company were “not sufficient to justify the further continuance of the business of insuring lives, granting annuities and incurring new obligations as authorized by its charter.” Edward Newcomb was appointed the receiver “of all the assets and credits of said company.”

In conformity also with said act, the receiver, after duly qualifying as such, appointed, with the approval of the superintendent of insurance, an actuary, Charles R. Knowles, who has made his report as required by statute. By such report the liabilities of the company are stated at \$1,173,650.99, and the assets \$1,133,068.40. The capital of the company was \$110,000, and according to the actuary's report the deficiency as to policyholders is \$40,564.59, and as to stockholders \$150,564.59.

Upon this report the receiver has asked the instructions of the court. Assuming the correctness of the report of the actuary there can only be one direction given, and that is that the receiver must proceed as the statute directs. The eighth section of the act under which these proceedings are conducted expressly provides: “And in case the said report of the said actuary shall show that the said securities, assets, credits and premiums are not sufficient under the laws of this state to pay all the policies, annuities and other obligations of said company as they may mature by the terms thereof, and the legal costs and expenses of said receivership, the said

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receiver *shall* notify the said superintendent thereof, and the superintendent *shall*, with the advice and consent of the treasurer of the state, and in such manner as the said receiver, superintendent and treasurer, or a majority of them, shall determine, sell and convert said securities into money, and the proceeds of such sale or sales *shall* be paid to the said receiver, on his giving his receipt to said superintendent, and *shall* be applied by said receiver as follows: To the payment of the registered policyholders of said company in proportion to the net value of their policies respectively, and to the registered annuities of said company in proportion to the then present value of their respective annuities as estimated by the legal standard for valuing life insurance and annuity obligations within this state. The surplus derived from such sale or sales, if any there be after the payments last above-mentioned, with all the other assets of the said company, shall be then applied to the payment of all the just debts of said company incurred in the conducting and carrying on its lawful business."

It is impossible to misunderstand these plain words. The court conceding the correctness of the actuary's report can give to its officer no other direction than that prescribed by the statute law. If, however, it is claimed that the actuary has made errors in his report, has undervalued assets, or adopted, in the making of his report, wrong legal principles, has the court any power to correct or amend it? This is certainly a very grave question, for whilst on the one hand a very plausible argument in favor of the power so to do can be made, based upon the general supervising prerogative of the court, another and very cogent one against it can be urged founded upon the language of the statute. When and how the assets of a corporation in the hands of a receiver shall be disposed of is certainly a subject within the legislative control. Has not that been declared in the provision above quoted? Action for the conversion of assets into money is to be taken, not when the court orders or approves but upon the report of

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the actuary showing the inability of the company to meet its obligations as they mature. The language is mandatory, and, perhaps, made more so by the previous part of the same section which has not been quoted. That portion marks out the course to be pursued when the actuary's report shows that the assets of the company "are sufficient, under the laws of this state, to pay all the policies, annuities and other obligations of said company as they may mature by the terms thereof, and the legal costs and expenses incident to the business;" but such action can only be taken "if said actuary's report shall be confirmed by the court." In short, the language of section 8 of chapter 902 of the Laws of 1869, to enable the receiver to continue the business of the company as in said act provided, requires the actuary's report of its ability to meet its engagement, and a confirmation thereof by the court; whilst to turn its assets into money by the joint action of the superintendent of insurance, the treasurer and the receiver, requires only the report of the actuary of its inability to meet its obligations. Can it be safely argued that when the same section of a law provides for one course of action only upon the concurring judgment of the actuary and of the court, and also for another, which is its direct opposite, upon the opinion of the former alone, that the omission to require the court to agree with him in the second case means nothing? What, too, it may with propriety be asked, shall be done when the actuary pronounces the company's assets unequal to the legal demands upon them, and the court differs in its conclusion upon the same point? Can the receiver proceed to collect the accruing premiums on the policies, and do what the first part of the section requires, when such part makes the right of the receiver so to act dependent upon the agreement of actuary and court as to the sufficiency of assets to extinguish liabilities? It is true, that under the same section a difficulty may arise as to the course to be pursued when the report of the actuary declares that the company is solvent as to its policyholders, and the court differs from him in judg-

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ment ; but should, for that reason, the section be so construed as to create a second dilemma in a certain contingency, when the words used do not require such a construction thereof ? Is it not, upon the whole, safer and better to follow the literal words, and hold that the business of the company shall be continued, provided the actuary reports that its assets are sufficient for that purpose, and the court confirms such report, but when the actuary reports them insufficient, that then their conversion into money and their division must proceed as the law directs ? Did not the legislature intend primarily the protection of policyholders ? To that end, has it not required the concurring judgment of actuary and court before they shall be compelled to pay further premiums, whilst, to secure an immediate distribution of assets among policyholders and creditors, the judgment of the actuary as to the insufficiency of the assets to meet obligations is alone required ? This view of the statute is not obnoxious to the objection that too grave consequences are made to depend upon the actuary's report, because at a prior date in the history of the company the superintendent of insurance and the court had determined that the company could not continue business with safety ; and when, therefore, the assets are distributed upon the actuary's report, there are, in addition, the judgments of the superintendent of insurance and the court as to the propriety of the course.

It is very apparent that the true construction of the statute we are considering is very doubtful. Upon the present argument, the right of the court to review, set aside, alter or correct the actuary's report seemed to be conceded. I have not felt myself at liberty to reach the same conclusion without a formal argument upon the difficult questions it involves, and which have been herein referred to. As, however, it was earnestly maintained on behalf of the company, and some of its policyholders, that the actuary's report is in many respects erroneous, and grave and large interests are confessedly at stake, I deem it safer to send the report back to the actuary

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for revision, and correction if he shall find any errors. It will be well for him to hear all parties who are interested, and, after doing so, to signify to the court his final conclusions by a supplementary report. When this shall have been done, counsel will be heard further upon the case as then presented.

OPINION No. 2.

WESTBROOK, J.—The actuary appointed under chapter 902 of the Laws of 1869, to whom his own report had been sent for revision and correction, if any, in his judgment, was needed, has, after a full hearing of all the parties interested, made a supplemental report in which he adheres to his conclusion that the above-named corporation is insolvent. The questions now submitted are, 1st. What power has the court over the report; and, 2d. Is the report substantially accurate?

When the matter came before the court upon the original report the views which were then entertained were fully stated, without, however, irrevocably expressing a conclusion. No argument has been presented which has in any degree shaken the reasoning in the opinion then written, and to which reference is now made. It will be sufficient for the court now to state in the briefest possible manner the reasons for concluding that upon this proceeding it has no power over the report.

It is a proceeding, not an action, founded upon a statute which marks out a line of conduct to be pursued. By the eighth section of the act (*chap. 902, Laws of 1869*), if the actuary reports the corporation solvent, and "the actuary's report shall be confirmed by the court," the receiver may continue the corporate business by receiving and collecting premiums, discharging obligations, and doing what that section provides. When, however (see same section), the actuary reports the company insolvent, the court is called upon to do nothing, but the receiver is commanded ("shall") to "notify the superintendent thereof," who in turn is commanded (word "shall" is again used, and continued through the whole sec-

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tion) "with the consent and advice of the treasurer of the state, and in such manner as the said receiver, superintendent and treasurer or a majority of them shall determine, sell and convert such securities into money," &c. Why, it may be asked, does the statute expressly require, in case the actuary's report sustains the solvency of the company, that it shall be confirmed by the court before future premiums upon policies can be collected, and the business continued as the statute directs; and why does it omit to require such confirmation when the actuary's report is adverse to the company's solvency? Was this omission undesigned or is it significant of legislative intent? It would be a poor compliment to the legislative department for the judicial to assume that it was purposeless. When the actuary made his report, the condition of the company had already been pronounced, by the superintendent of insurance and the court, unsafe. Before policyholders were thereafter to be subjected to further hazards in paying premiums upon their policies, the law required the concurring judgments of actuary and court. If, however, the actuary's report is also against the safety and solvency of the company, then without any further judicial action its assets must be administered under the statute. Human judgments are, of course, fallible; but it is not unreasonable to say that a company should cease to exist and its assets be distributed when these public functionaries—the superintendent of insurance, the actuary and a judge of the supreme court—have declared the unsafety of its longer continuance in being.

It may also be said that the condition of the association would be anomalous if the court refuses to confirm the actuary's report. What would the policyholders be compelled to do? Actuary and court must both agree by the express words of the act that the company is solvent before they can be compelled to pay premiums, and, therefore, if this report is unconfirmed, all action must be suspended. The actuary is an officer independent of the court. He acts upon

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his own judgment and oath, and it would, it seems to me, be against the whole spirit and policy of the law for the court to compel him to report against his own clear convictions, and it is powerless to remove him and to appoint another.

For these reasons, very hastily penned, both because of the great pressure of official duty and the need of prompt action, the receiver is instructed to follow the statute and act in conformity with the eighth section of the law referred to.

We have not deemed it necessary to go over the detailed objections made to the actuary's report, and have already intimated that the court has no power over it. Justice, however, to a faithful, honest and intelligent officer induces us to state that we find no substantial error committed by him.

Sloan *et al.* agt. Livermore.

SUPREME COURT.

WILLIAM SLOAN *et al.* agt. EDWARD LIVERMORE.*Order of arrest — motion to vacate — construction of section 558.*

TO justify vacating an order of arrest under the last clause of section 558, it must *affirmatively* appear by the complaint that the cause of action is such that in *no event* could the defendant be arrested within sections 449 or 450. (*See, to same effect, Williams agt. Norton*, 54 How., 509; *Thompson et al. agt. Friedberg*, 54 *id.*, 519; *Mather agt. Hannaur*, ante, 1; *contra, Bowery National Bank agt. Duryea*, 54 How., 450.)

General Term, First Department, March, 1878.

THIS is an appeal from an order of the special term refusing to vacate an order of arrest.

D. N. Rowan, for appellant.*Edmund Coffin, Jr.*, for respondent.

INGALLS. *J.* — The complaint in the above action contains a cause of action for goods, wares and merchandise sold and delivered by plaintiff to defendant, and for work, labor and services performed by plaintiff for defendant, with the demand for judgment, in favor of plaintiff, of \$2,689.78. Upon such complaint, a summons and sundry affidavits, showing a fraudulent disposition of property by the defendant, the plaintiff obtained an order of arrest, which, upon motion, the special term refused to vacate, and the defendant appeals to this court. The appellant insists that as the complaint does not state a cause of action which, unsupported by affi-

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davits, would justify an arrest, the order was improperly granted, and should have been vacated by the special term. The decision of this appeal involves a construction of section 558 of the Code of Civil Procedure, which is as follows: "Subject to the provisions of the last preceding article, the order may be granted at any time after the commencement of the action. It may also be granted to accompany the summons; but at any time after the filing or service of the complaint the order of arrest must be vacated on motion, if the complaint shows that the cause is not one of those mentioned in section 549 or 550 of this act." To justify vacating the order of arrest under this provision of the Code, the complaint must show that the case is not one of those mentioned in section 549 or 550. The second subdivision of the last-mentioned section states as follows: "In an action upon contract, express or implied, other than a promise to marry." This portion of said subdivision specifies one of a class of actions in which an arrest may be made. The cause of action, to be within such subdivision, must be upon contract, not fraud; the latter is specially mentioned as ground of arrest in section 549; and it should not be inferred that a repetition was intended. A cause of action is clearly distinguishable from cause or ground of arrest. A complete cause of action is stated in this complaint, but not a cause which would justify an arrest. The facts upon which an order of arrest is granted may not exist when the contract is made, nor even when the action is commenced. The language of the statute is: "Or has since the making of the contract, or in contemplation of making the same, removed or disposed of his property with intent to defraud his creditors," &c. We cannot reasonably infer that it was intended by this provision to compel the pleader to mingle two distinct causes of action in the complaint, one upon contract and the other for fraud, in order to justify an arrest. Section 557 provides for granting an order of arrest upon affidavits, which shows that it was not the intention to rely exclusively upon a complaint in

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order to enable the defendant, by answer, to frame an issue, and thereby determine the right to arrest. The said second subdivision, after specifying the nature of the action, viz., contract, proceeds to define the grounds which would justify an arrest in such action, namely, fraud in contracting the debt, or a disposition of property with intent to defraud creditors, &c.

It is not expressly stated that the facts relied on to cause the arrest must be alleged in a complaint; and we are disinclined to infer that so important and radical a change in the law in regard to arrest was intended to depend upon mere inference. We are of opinion that, to justify vacating an order of arrest under the last clause of section 558, it must affirmatively appear by the complaint that the cause of action is such that in no event could the defendant be arrested within said sections 449 or 450. We have seen that the cause of action stated in the complaint herein is such that, under certain circumstances, the defendant might be arrested, and, therefore, the defendant was not entitled upon that ground to have the order of arrest discharged.

The facts contained in the affidavit are sufficient to uphold the order made at special term, and the same should be affirmed, with costs.

DAVIS, P. J., and BRADY, J., concurred.

Bowery National Bank agt. Duryea.

SUPREME COURT.

THE BOWERY NATIONAL BANK agt. ABRAM DURYEA.

Order of arrest — Construction of section 558.

Facts upon which an order of arrest is based, which are extrinsic to the cause of action, need not be set forth in the complaint (*Reversing S. C.*, 54 *How.*, 450).

General Term, First Department, March, 1878.

THIS is an appeal by the plaintiff from an order of the special term vacating an order of arrest. The order of arrest was issued against the defendant for having been guilty of fraud in contracting his liability, for which the action was brought. The court vacated the order solely on the ground that the extrinsic facts alleged in the affidavits, upon which the order of arrest was granted, was not alleged in the plaintiff's complaint (*See 54 How.*, 450).

A. R. Dyett and Abram Kling, for appellant.

W. M. Ivins, for respondent.

INGALLS, *J.* — The special term decided this motion upon the ground that the complaint did not contain a cause of action which justified an arrest, and therefore, by section 558 of the Code of Civil Procedure, the defendant was entitled to have the order of arrest vacated without regard to the facts contained in the affidavits.

Although much impressed by the cogent reasoning of the learned justice who decided this motion at special term, a

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careful examination of the question has led me to a different conclusion, the reasons for which are contained in an opinion in the case of *William Sloan et al. agt. Edward Livermore*, which was argued at the same term of this court and involved the same question (*See ante*, p. 85).

We deem it unnecessary to repeat the reasoning in this case and refer to the opinion in the case above mentioned.

The order of the special term must be reversed, but without costs of this appeal as the question is new.

DAVIS, P. J., and BRADY, J., concurred.

NOTE.— We understand that an appeal has been taken in the above cause to the court of appeals, where the question as to the true construction of section 558 will be finally settled. Should this court concur in the views expressed in the two foregoing opinions of the general term we think the section should be stricken from the statute book as *meaningless*. [Ed.]

De Peyster agt. Beekman.

SUPREME COURT.

J. WATTS DE PEYSTER agt. HENRY R. BEEKMAN and others.

Trustee of personal property—who succeeds on his death—application for appointment of new trustee.

The purposes of a trust of personal property stand as at common law, and are not limited by statute, subject nevertheless to the rule against the suspension of ownership for more than two lives (*Gilman agt. Reddington*, 24 N. Y., 13; *vide note at end of this case*).

The fact that more than two *cestuis que trust* might enjoy the benefit of the trust for life, and that one of the designated beneficiaries was not in being at the time of the creation of the trust, does not invalidate it, when the duration of the trust could in no event extend beyond the *life of the creator of the trust*.

The executors, &c., of a deceased trustee of personal property succeed to the trust, and in case an application be made to appoint a new trustee, they are the proper persons to initiate the proceedings. It is not necessary that the creator of the trust should be notified of the application.

Special Term, November, 1877.

DEMURRER to complaint.

This action was brought for the purpose of obtaining an adjudication that a trust created by the plaintiff for the benefit of the plaintiff's son and his wife, and their issue, was terminated and ended, or for the appointment of a new trustee in the place of the one originally named, who had died. The plaintiff's son and wife had also died, leaving a son them surviving. It appeared that a new trustee had been appointed by the court upon the application of the executors, &c., of the deceased trustee, of which application no notice had been given plaintiff.

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Henry R. Beekman, in person, and *David B. Ogden*, for defendants Livingston and another, in support of the demurrer.

George H. Brewster, of counsel for plaintiff, opposed.

VAN VORST, J.—The trust created by the agreement and settlement between the plaintiff of the first part, James F. De Peyster, as trustee for Frederic De Peyster, Jr., of the second part, and Frederic De Peyster, Jr., of the third part, by which a certain sum annually was provided and settled by the plaintiff for the support and maintenance of Frederic De Peyster, Jr., and his wife Mary, and of any issue born of the marriage, has not expired by force of any limitation contained in the instrument itself, for by the terms of the trust it can only terminate upon the death of the plaintiff.

The provision in favor of Frederic De Peyster, Jr., was to continue during the lives of the parties of the first and third parts, and in favor of Mary, the wife of Frederic, and the issue of the marriage, if such issue should survive Frederic, during the lifetime of the party of the first part.

The result is, that, although Frederic De Peyster, Jr., and his wife are both dead, the trust must continue in favor of the defendant, Clement L. De Peyster, the son of Frederic and Mary, the last surviving *cestui que trust*, during his life, if he should survive the plaintiff.

The provisions of the trust do not violate any statutory or other rule of law. It is a trust of personal property, and as such its purposes are not limited by statutes (*Gilman* agt. *Reddington*, 24 N. Y., 13).

Such trusts stand as at common law, but subject nevertheless to the rule against the suspension of ownership for more than two lives. But there is no transgression of the rule in this case.

The trust does not violate the statute against perpetuities, for under no circumstances could it survive the plaintiff, who created it.

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The fact that more than two *cestuis que trust* might enjoy its benefits for life, and that one of the designated beneficiaries was not in being at the time of the creation of the trust, does not invalidate it, as the duration of the trust in no event could extend beyond the life of the creator of the trust (*Woodgate agt. Fleet*, 64 *N. Y.*, 566; *Mannice agt. Mannice*, 43 *id.*, 303; *Gilman agt. Reddington*, *supra*). But the regularity and validity of the appointment of a new trustee by the order of the court, upon the death of James F. De Peyster, the trustee originally constituted, is called in question.

The complaint shows that the defendant Beekman was appointed trustee by the order of the court, made upon the petition of the executors of the last will, &c., of the original trustee, and without notice to the plaintiff.

The application by the executors was doubtless made upon the idea that the executors of the former trustee succeeded to the trust and were the proper persons to initiate the proceedings for a new trustee.

They were correct in this conclusion, the trust having relation to personal property (*Bunn agt. Vaughan*, 5 *Abb. Pr. R. [N. S.]*, 269; *Bucklin agt. Bucklin*, 1 *Keyes*, 141). But the result would be the same if it should be held that the trust, upon the death of James F. De Peyster, devolved upon the court. No provision is made by statute as to who shall initiate the proceeding for the appointment of a new trustee. The court must be put in motion upon the application of some person having relation to the subject. The executors of the former trustee were, in such case, proper persons to bring the matter by petition before the court. The appointment, after all, must be made by the court.

An appointment made on the petition of the executors of a deceased trustee of real estate was sustained in *Clark agt. Crego* (47 *Barb.*, 599); *Clark agt. Crego* (51 *N. Y.*, 646). Although it was highly proper to have given the plaintiff notice of the application, still the omission to do so does not render the appointment of the new trustee either void or

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irregular. It is a matter within the discretion of the court as to who shall be brought into the proceeding.

It cannot be said that the plaintiff was absolutely entitled to notice of the proceeding (*The Matter of Livingston*, 34 N. Y., 555). In such proceeding the requiring the presence of all parties interested is one of convenience subject to modification and discretion (*In the Matter of Geo. W. Robinson*, 37 N. Y., 261). The plaintiff was the creator of the trust; as such he has no interest in its administration, that concerns the *cestui que trust*, and the trust deed must control.

I do not see how the plaintiff can be at all injured by any action of the trustee. He is obliged, during his lifetime, to pay the amount provided for annually if the *cestui que trust* should live so long. Upon the death of either the trust terminates.

I must conclude that no cause of action is disclosed by the complaint, and that there should be judgment for the defendant on the demurrer. The question of costs will be determined upon the settlement of the order.

NOTE.—At the April special term, 1878, in the case of *Charles Tracy and others* agt. *Louisa Susan Wright and others*, in an application made to the court upon a complaint for instructions in regard to the administration of a trust, and the succession in, the case of a trust of personal property, the surviving trustee having died, the following opinion was delivered:

“VAN VORST, J.—This being by force of the will under consideration a trust of personal property, and the trust fund being wholly, in law and equity, personal property, the provisions of the Revised Statutes regulating the disposition of trust estates on the death of the trustee do not apply (1 Rev. Stat., pp. 780, 781). The trust, under the circumstances, does not fall upon this court (*Bucklin* agt. *Bucklin*, 1 *Abbott's Appeal Cases*, 242; *Bunn* agt. *Vaughan*, *idem*, 253; *Emerson* agt. *Bleakley*, 2 *Abbott's Appeal Cases*, 22). The functions of a trustee of personal estate devolve upon the executors of the last trustee. They execute the office of trustee by succession.

It must, therefore, be adjudged that the plaintiffs are the true and lawful trustees of the trust in succession to John Butler Wright, deceased, and hold and are to exercise all the rights, powers and duties of trustees under the will of James Bogart, deceased.”

Quackenbush agt. Johnson.

SUPREME COURT.

JOHN QUACKENBUSH and HENRY QUACKENBUSH agt. DAVID JOHNSON.

Referee — Report to be filed within sixty days after submission — what is a sufficient compliance with section 1019 of Code of Civil Procedure.

The submission to the referee was December 26, 1877. On February 22, 1878, the referee prepared, finished and signed his report, and on the twenty-third notified the attorney for the defendant that he had made his report for defendant and had left the same on his (the referee's) table for the defendant's attorney, and at the same time he stated to defendant's attorney the amount of his fees. On the twenty-third or twenty-fifth of February the defendant's attorney informed the plaintiffs' attorney that the referee had made his report for defendant and that the referee was about to prepare an opinion which he would serve with a copy of the report:

Held, that the facts shown in the case and the notification made by the referee to defendant's attorney was, in substance and effect, a delivery of the report to the attorney within the provisions of section 1019 of the Code of Civil Procedure.

Oneida Special Term, April, 1878.

Link & McEvoy, plaintiffs' attorneys.

H. Clay Hall, defendant's attorney.

NOXON, J. — The motion in this case is made by plaintiffs' attorneys to set aside the report of the referee on file in Herkimer county, the costs adjusted by the clerk, the judgment entered upon the report and all subsequent proceedings by defendant as irregular, null and void, upon the ground that the referee had not filed his report with the clerk, and had not delivered the report to either of the attorneys within sixty days from the time when the cause was finally submitted to the referee, and on the ground that before the report was

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filed or delivered the plaintiffs' attorneys served notice upon defendant's attorney that they elected to end the reference, and on the ground that neither report or judgment was against the plaintiff Henry Quackenbush but against John Quackenbush alone.

The important question in the case as disclosed by the affidavits arises upon the language and construction of section 1019 of the Code of Civil Procedure. By this section it is provided that the written report of a referee "must be either filed with the clerk or delivered to the attorney for one of the parties within sixty days from the time when the cause is finally submitted." From the facts disclosed by the affidavits it clearly appears that the report was not *filed* with the clerk within sixty days. The only question left for construction is, was the report of the referee delivered to the defendant's attorney within sixty days from the time the cause was finally submitted to him? The submission to the referee was December 26, 1877. On February 22, 1878, the referee prepared, finished and signed his report, and on the twenty-third notified the attorney for the defendant that he had made his report for defendant and that he had left the same on his (the referee's) table for the defendant's attorney, and at the same time he told the defendant's attorney that if the parties desired an opinion in the case he would write one, and at the same time he stated to defendant's attorney the amount of his fees. The report of the referee, as filed in the clerk's office on February 28, 1878, is stated by the referee in his affidavit to be, in all respects, complete as made and signed by him. The defendant's attorney in his affidavit states that on the twenty-third or twenty-fifth of February he informed Mr. McEvoy, one of plaintiffs' attorneys that the referee had made his report for defendant and that the referee was about to prepare an opinion which he would serve with a copy of the report, and which statement is not denied by Mr. McEvoy. The statute does not require the referee to file his report. The same is to be delivered to the attorney, and if delivered the reference can-

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not be ended in the manner prescribed in the section. The object and aim of section 1019 was to enable the parties to an action to compel a speedy decision in case of reference. Without some such provision parties in actions pending in courts with crowded calendars were inclined to be averse to references, but with a provision calculated to enforce promptness upon the referee the objection of litigants is, in great part, overcome. In this case the referee has fully discharged his duty within the time fixed by statute. He has examined the case, reached his conclusion, made and signed his report and notified the party entitled to it and informed him of his fees. This ended his duty as referee. He had no power thereafter to amend or alter his report. He was entitled to his fees; and the rule has, in some cases, been laid down that he is entitled to retain the report until his fees are paid. The facts shown in the case and the notification made by the referee to defendant's attorney was, in substance and effect, *a delivery* of the report to the attorney and should be sustained as such by the courts. Three days before notice was served by plaintiffs' attorneys to end the reference they were notified that the referee had made his report, and the notice given by them was hardly in good faith, upon and under a just and liberal construction of the statute, to expedite such cases instead of continuing them in the courts after a decision had been made and from which the plaintiff's right of appeal was perfect. The ground is also taken that the report and judgment is against John Quackenbush alone. This ground is one which is not available to plaintiff. On the trial the plaintiff moved to amend by striking out the name of Henry Quackenbush from the complaint as a party plaintiff. The leave was granted and thereafter the cause proceeded in the name of John Quackenbush, and he was the only party plaintiff at the time of the submission and there was no irregularity in the report or judgment in that respect.

The motion should be denied, with ten dollars costs to be paid by the plaintiff John Quackenbush to the defendant.

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SUPREME COURT.

OREN F. BROWNING agt. FERNANDO DE C. VANDERHOVEN *et al.*

Costs — Administrator's bond — Liability of surety for costs awarded by surrogate to counsel, on application by a creditor of the estate for an accounting by administrator, and also payment of creditor's claim.

The defendants are sureties on an administrator's bond, conditioned for the faithful execution of the trusts reposed in the administrators, and their obedience to all orders of the surrogate touching such administration. A creditor, represented by plaintiff as her counsel, filed her petition with the surrogate for an accounting by the administrators of all the effects received by them, and also for the payment of her claim. The administrators were required to account, and such account embraced their entire transactions in the estate, which was shown to be of the value of \$1,495. The surrogate directed payment, among other things, out of the moneys so shown to be in their hands, the sum of seventy dollars to the plaintiff, which was allowed him as a reasonable counsel fee in the proceedings, and which was less than five per cent upon the value of the property involved in the account.

Held, that in such a case the creditor is only entitled to an allowance upon his judgment, not upon the value of the property sought to be reached.

Held, further, that the decree of the surrogate was not conclusive upon the sureties, as the surrogate exceeded his jurisdiction in making the allowance.

Special Term, May, 1878.

ALL the material allegations of fact are undisputed. It is admitted that, on the 25th day of May, 1875, the defendants executed the bond set forth in the complaint, conditioned for the faithful execution of the trusts reposed in the administrators of William R. Hazlett, deceased, and their obedience to all orders of the surrogate touching such administration.

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That, on the 29th May, 1875, letters of administration were duly issued to such administrators, who thereupon duly entered upon the duties of their office.

That Emily Kelly, a creditor of the estate of the deceased, subsequently filed her petition with the surrogate for an accounting by said administrators of all the effects received by them, and also for the payment of her claim.

That thereupon the administrators were required to account, and such account embraced their entire transactions in such estate, which included the filing of an inventory of all the property they had received and an account of all their disbursements, whereby it appeared that the value of the estate thus accounted for was \$1,495.

Upon this showing, the surrogate directed payment, among other things, out of the moneys so shown to be in their hands, the sum of seventy dollars to the plaintiff in this suit, which was allowed him as a reasonable counsel fee in the proceedings, and which was less than five per cent upon the value of the property involved in the account.

That a certificate of said decree was thereupon duly filed in the office of the clerk of the city and county of New York, and an execution thereupon duly issued as of a judgment of the court of common pleas, which was returned wholly unsatisfied; and that thereupon the surrogate, on or about the 12th day of November, 1877, by an order under his hand and seal, duly assigned to the plaintiff the bond of the defendants for the purpose of prosecuting the same in his behalf, pursuant to the statute in such case made and provided. In other words, no question was made as to the regularity and correctness, in point of form, of all the proceedings set forth in the complaint as constituting the basis of the action.

O. F. Browning, in person. *Charles H. Munday*, of counsel.

I. The decree of the surrogate, that the administrators pay

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to the plaintiff the sum of seventy dollars as a reasonable counsel fee allowed him in the proceedings, whether it run against the administrators personally or against the estate, was an order touching the administration of the estate, and came within the condition of the bond. In point of fact, however, it only required the administrators to pay the same out of the funds in their hands belonging to the estate. This is apparent from the language of the decree. After reciting the accounting proceedings, and that so much money was found in their hands "properly applicable thereto," it then goes on to provide for the payment, *first*, of the debt of Emily Kelly, and, *second*, the sum awarded to the plaintiff herein as his counsel fee. No presumption will be indulged to the effect that the administrators shall personally be liable therefor. To have such an effect, the language of the decree must admit of no other construction.

II. The position assumed by the defendants' counsel upon the trial, that the allowance of the surrogate to counsel belonged to the client and not to the counsel, is not tenable. The case of *Noyes et al agt. The Children's Aid Society* (10 *Hun*, 289; 53 *How.*, 10), subsequently affirmed in the court of appeals (5 *Weekly Digest*, 130), which was cited and relied upon in support of that position, does not warrant such construction. It simply decides that, in granting such allowances to counsel in any proceedings before him, his power is confined to the manner prescribed in sections 308 and 309 of the Code of Procedure. Indeed, this follows necessarily from the very language of the statute (*Laws of 1870, chap. 359, sec. 9*). This statute differs very materially from the Code of Procedure as to the person to whom the allowance can be made. The latter expressly provides that the costs and allowances shall be made and belong to the party to the action, leaving him to settle with his counsel as he may see fit. It is in the nature of an indemnity to the client for the expenses incurred by him for counsel. At common law, the costs or fees incident to actions belonged to the attorney, and not to the

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party. The Code of Procedure modified the common law in this respect ; not so, however, with that section of the statute which empowers the surrogate to grant allowances ; by its express terms, such allowances are to be granted to counsel, and not to the party. All that is decided, therefore, by the case cited is that, in making such allowance to counsel, the surrogate shall be limited as to the amount, for example, by the provisions of the Code of Procedure.

III. The surrogate, by the provisions of the Code of Procedure, was authorized to award the plaintiff five per cent of the amount of the subject-matter involved, and was not limited, as was contended by the defendants' counsel, to five per cent of the amount of the creditor's claim. If the petition to the surrogate had been simply for the payment of the petitioner's claim, and the proceedings had thereon involved only the payment of such claim, the defendants' position would perhaps be sound. But in this case the administrators had never filed an inventory or rendered an account of their proceedings, and it was an essential prerequisite to the obtaining of the relief asked for that such an account should be rendered. This accounting, which was had under the supervision of the petitioner's attorney, involved for its subject-matter the entire estate, amounting to about \$1,500. Such accounting took the usual course of reference to an auditor, the taking of testimony, objections to the account, filing the report of the auditor, the motion to confirm the same, and the decrees for the settlement thereof. This was not simply for the benefit of the petitioning creditor, but on behalf of, and inured to the advantage of, all other creditors and persons interested in the estate, and saves to them the necessity and expense of such a proceeding on any other application. It is in this respect analogous to an action in this court for a partition of real estate wherein, although the plaintiff's claim or interest may bear a small proportion to the entire estate, there is necessarily involved the value of the whole property,

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and the courts have uniformly felt authorized to grant to the attorney an allowance limited only by the total value.

IV. The plaintiff is entitled to judgment against the defendant, for the full amount claimed, and costs.

D. M. Porter, for defendant Cummings. The defendant, George F. Cummings, is the sole defendant served, and consequently all inquiries relate to him.

I. The defendant Cummings gave his bond, *i. e.*, became surety, that the administrators, &c., would obey all orders, &c., but only such orders as authorized payments out of the estate; in other words, they were sureties that the fund should not be dissipated. Consequently this defendant is not responsible for costs which are not expressly charged upon the fund or payable out of it by force of law. Now, if the defendant Cummings pays these costs, the other creditors or the heirs can successfully compel payment to them of all the estate except the amount of principal and interest paid to Kelly, exclusive of the costs and counsel fee. The administrators cannot pay this counsel fee out of the estate (*Farrin agt. Myrick*, 41 *N. Y.*, 315; *Austin agt. Monroe*, 4 *Lans.*, 67; *S. C.*, 47 *N. Y.*, 360). Consequently the defendant Cummings is not liable, as it is an act between others, and not for what he became surety.

II. The costs and allowance belong to Kelly, and not to the plaintiff (*Code*, 309; *Noyes agt. Children's Aid Society*, 10 *Hun.*, 289; *S. C.*, 53 *How.*, 10). Laws 1870, page 828, provides that the allowance shall be "in lieu of costs," and shall be allowed *in the same manner* as are now *prescribed* by the *Code of Procedure*, and under the Code the costs belong to the client. The authorities are uniform to this.

III. The surrogate had no jurisdiction to allow more than five per cent on \$137.50 principal and the interest at the date of the surrogate's order, some eleven or twelve dollars. By the act of 1870 the surrogate can only allow the parties on the amount of their claim. When the other creditors come

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in, they will ask an allowance. The subject-matter of the allowance is the amount involved in the controversy, *i. e.*, Kelly's claim, which she asks to recover. Neither what is left by her nor the value of what is left authorizes an allowance upon that (*The People agt. N. Y. and S. J. F. Co.*, 68 *N. Y.*, 71; *see bottom of page 82 and top of page 83*). By the law it can only be five per cent on the amount recovered by Kelly. The recovery of the judgment by Mrs. Kelly concludes the plaintiff. Judgment should be for the defendant.

BARRETT, *J.*—It was the creditor's demand, and not the estate itself, which was the subject-matter involved in the proceeding before the surrogate. The accounting was but an incident. It is not analogous to a partition suit, as claimed by the plaintiff, nor to an action to restrain the erection of a structure (68 *N. Y.*, 71), as the defendants insist, but rather to a creditor's bill.

In such a case the creditor would only be entitled to an allowance upon his judgment, not upon the value of the property sought to be reached.

This is well settled in *Struthers agt. Pearce* (51 *N. Y.*, 365). The plaintiff claimed as a copartner and recovered one-fourth interest in a lease taken by the defendants in their own name. It was held that he was entitled to an extra allowance only upon the one-fourth. The claim of an allowance upon the value of the lease was repudiated, Lorr, Ch. J., remarking: "It might, as it seems to me, be claimed with equal propriety that a plaintiff who commenced an action for the settlement of partnership matters and accounts, and the payment of his share as a partner, could have an allowance made to him based on the entire amount of assets involved in the settlement."

Further, this construction is the only reasonable one; otherwise a number of small creditors applying for payment at the same time might consume the estate in allowances.

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Then look at the converse. Will it be contended that, if the surrogate had dismissed the creditor's proceeding, she could have been mulcted in five per cent upon the entire estate? Both on principle and authority it seems clear that the allowance in question was without jurisdiction.

The question remains as to whether these sureties can take the objection.

The object of the statute (*Laws of 1870, chap. 359, sec. 1*) appears to be to place the surrogate's court, in this matter of jurisdiction, upon the same plane as courts of general jurisdiction. Under this section, the remedy of the administrator was probably limited to an appeal. The sureties, however, were not parties to the record, and could take no appeal. It is doubtful whether they could move the surrogate and, in case of his adherence to the original judgment, obtain a review by appeal from the denial of their motion.

Be that as it may, the legislature never intended, as to the parties *dehors* the record, to overturn the general policy of the law, which allows the fullest inquiry into jurisdiction. *Schofield agt. Churchill* (reported in the *N. Y. Weekly Digest of April 29, 1878, vol. 6, No. 9*) is not in point.

In that case there was no question of jurisdiction. The bond was executed to save the executor from removal on a charge, substantially, of misappropriation; and the defense of this very misappropriation was, therefore, clearly frivolous. The decree in that case was, of course, conclusive upon the sureties. The court said it was conclusive in the absence of fraud and collusion; we may add, in the absence of an excess of jurisdiction.

There must be judgment for the defendants, with costs.

Douglas agt. Knickerbocker Life Insurance Co.

N. Y. SUPERIOR COURT.

JOSEPHINE S. DOUGLAS and JENNIE S. TWEED agt. THE
KNICKERBOCKER LIFE INSURANCE COMPANY.

*Life insurance—Action in equity to compel issuance of paid-up policy—
Defense violation of condition that party insured should not travel upon the
seas or pass beyond the civilized settlements of the United States.*

The policy was issued and accepted upon the express condition enumerated therein, that if the party whose life was thereby insured should, without the written consent of the company previously obtained, travel upon the seas or pass beyond the civilized settlements within the United States, &c., &c., the policy should be void, null and of no effect. The insured, after having on the 4th of December, 1875, escaped from the custody of the sheriff of the city and county of New York, was, during the year 1876, found in the port of Vigo, in Spain, where he had gone without defendant's consent, from whence he was subsequently brought back to New York as a prisoner:

Held, that upon this state of facts an important condition upon which the policy had been issued and accepted was violated, and that in consequence thereof the contract between the parties came to an end by its own limitation, unless continued in force by some other provision or by defendant's waiver of the violation.

Equity will not relieve against such violation, because the policy states that written permits will be granted on reasonable terms for persons insured in said company to make voyages to any foreign country. The granting of such a permit upon terms to be prescribed by the company involves a new bargain to be entered into by the parties to the original contract, which the court cannot make for them. The company has a right to determine each application for a permit upon its own facts, and with special reference to the additional risk to be incurred.

Upon the back of the policy the following further stipulation appears: "It being understood and agreed that if, after the receipt by this company of not less than three or more annual premiums this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, the company will issue a new policy for the full

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value acquired under the old one, subject to any notes that may have been received on account of premiums, &c., &c." This stipulation appears at the foot of all the conditions, and was indorsed upon the policy in red ink, and separately signed by the president and secretary of the company:

Held, that this clause is available to the person whose life is insured, as well as to the beneficiaries. It is not a separate contract, because standing by itself, nor is it capable of separate execution or enforcement. There was no contract with the beneficiaries separate and apart from that made with the person whose life was insured, nor did they acquire any vested rights after the payment of the third annual premium, which could not be divested by a subsequent breach of a condition not covered by the saving clause, nor were they entitled to notice of the election of the company to treat the policy as at an end in case of a violation of any of its conditions not embraced in the clause last referred to.

Held, further, that, regarding the plaintiffs exclusively in the light of beneficiaries, they having chosen the insured as the subject of risk under certain conditions which they agreed to accept, he having violated them, his breach is their breach, and by such breach the policy, by its express terms, became null and void.

Held, also, that the policy ceased to exist by the insured's travels upon the ocean to reach Spain; and hence, on the first day of October, 1876, there was no policy in force on which the premium could be paid. It had become null and void, and it could only be revived by the mutual agreement of the parties. No such agreement having been made, and there being no waiver of the violation, the plaintiffs could not, by electing on the 1st of October, 1876, to omit to pay the premium due on that day, impose upon the defendants the liability to issue a new policy for eight-tenths of the sum originally insured.

Special Term, May, 1878.

ACTION in equity to compel defendant to issue to plaintiffs a paid-up policy for \$8,000 as for eight-tenths of sum insured by policy issued by defendant on the 1st day of October, 1868, in the sum of \$10,000.

Sewel & Pierce, attorneys, and *Robert Sewell* and *A. B. Conger*, of counsel, for plaintiffs.

Johnson, Cantine & Deming, attorneys, and *A. J. Vanderpoel*, of counsel, for defendant.

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FREEDMAN, J. — By the terms of the policy, and in consideration of the premium of \$1,180.90 paid, and of the annual payment of a like sum, to be paid on or before the first day of October, at noon, in every year during the continuance of the policy, the defendant assured the life of William M. Tweed, of New York, in the amount of \$10,000, for the benefit of the plaintiffs, his daughters, share and share alike; and, in case of the death of either or both, the portion belonging to the deceased child or children to pass to Mary J. Tweed, the wife of said William M. Tweed. In case of the death of William M. Tweed before the 3d day of April, 1878, the defendant stipulated to pay the amount insured to the beneficiaries as stated, but in case he should be alive on that day, the amount was to be paid to him, whereupon the policy should be void.

This policy was issued and accepted upon the express condition enumerated therein, that if the party whose life was thereby insured should, without the written consent of the company previously obtained, travel upon the seas (except in voyages between coastwise ports of the United States) or should pass beyond the civilized settlements in the United States (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia or New Brunswick), the policy should be void, null, and of no effect.

It is upon an alleged violation of this clause that the defense mainly rests, for the defendant has shown by testimony which was not controverted, that William M. Tweed, after having on the 4th of December, 1875, escaped from the custody of the sheriff of the city and county of New York, was during the year 1876 found in the port of Vigo, in Spain, a distance of about 3,500 miles from New York, where he had gone without defendant's consent, and that on the 26th of September, 1876, he was, at said port, placed on board the United States man-of-war Franklin, and subsequently brought back to New York on said vessel as a prisoner.

Upon this state of facts there can be no doubt that an

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important condition upon which the policy had been issued and accepted, was violated and that in consequence thereof the contract between the parties came to an end by its own limitation, unless continued in force by some other provision or by defendant's waiver of the violation.

There is no evidence of any waiver. It has been argued, however, that because the policy states that written permits signed by the president or secretary of the company will be granted on reasonable terms for persons insured in said company to make voyages to any foreign country, equity will relieve against the violation. The answer to this proposition is that the granting of such a permit upon terms to be prescribed by the company involves a new bargain to be entered into by the parties to the original contract, which the court cannot make for them. As matter of law the company has a right to determine each application for a permit upon its own facts and with special reference to the additional risk to be incurred (*Rainsford agt. The Royal Ins. Co.*, 1 *Jones & Sp.*, 453; *affirmed*, 52 *N. Y.*, 626).

Nor is there any evidence showing upon what terms Tweed would or could have obtained a permit if he had applied for one, or that the company had or has a uniform rule upon the subject. Under these circumstances the company cannot at this late day be adjudged liable to execute a permit *nunc pro tunc* upon such terms as to the court may seem reasonable.

Thus, in *Hathaway agt. Trenton Mutual Life and Fire Insurance Company* (11 *Cush. [Mass.]*, 448) the condition of the policy was that it should be void and of no effect, if the assured, without defendant's consent previously obtained and indorsed upon it, should pass beyond the settled limits of the United States. In returning from California he did go beyond those limits, and the court held that the policy was thereby rendered invalid and the defendant discharged from all liability upon it, unless the company did give its consent that he might do so. It then appeared that the assured had permission to make one voyage to California and home in a

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first-rate vessel round Cape Horn or by Vera Cruz; but it also appearing that the assured had returned home by way of Panama and Chagres, the court held, that the consent given was not a general license, but a carefully defined and restricted permission; that in giving it, the company had a right to fix its own terms and to circumscribe it within such limitations as it deemed expedient; that, as given, it restricted the assured to the two routes named; and that having chosen to return by neither, but by a third, not embraced in the consent, there was a breach of the condition of the policy which rendered the policy void, although there was then no usually traveled route by way of Vera Cruz, and although he may have returned the shortest and safest way.

In *Nightingale agt. The State Mutual Life Insurance Company of Worcester* (5 R. I. [2 Ames], 38) the policy fixed the limits of constant residence of the assured within certain states of the United States, with the privilege to travel or be in others upon certain conditions. One of these conditions was that if the assured should, without the consent of the company first had and indorsed upon the policy, go into any of the states prohibited between the first day of July and the fifteenth day of October of any year and remain therein more than five days, the policy should become void and all payments thereon should be forfeited to the company. The policy further provided that "in case of forfeiture from the above or any other cause the party interested shall have the benefit of such equitable adjustment as may from time to time be provided by the board of directors." The assured went into one of the prohibited states, in violation of the provisions stated, and after remaining therein ten days, was attacked by apoplexy and died. The proof showed that such violation did not contribute to the death, and it was claimed that the policy upon its face held out an express promise of an equitable adjustment in case of forfeiture from the alleged or any other cause. But the court held that it had no power to interfere with the action of the directors or to dispense

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with or qualify the forfeiture of the policy according to its own notions of what would be an equitable adjustment under the circumstances.

The policy in the case at bar also provides that the omission to pay the annual premium on or before 12 o'clock, at noon, on the day or days mentioned therein for the payment thereof, shall then and thereafter cause said policy to be void, without notice to any party or parties interested therein. One of the conditions printed upon the back of the policy reiterates this requirement, and by still another clause contained in the body of the policy it is provided, that if it shall be found that the conditions printed on the back thereof have been violated, the policy shall be void and of no effect, either to the insured, insurer, or any party to whom this policy may be assigned, and all the premiums paid thereon shall be forfeited to the company.

But, upon the back of the policy, the following further stipulation appears :

"It being understood and agreed, that if, after the receipt by this company of not less than three or more annual premiums, this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, the company will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums, that is to say, if payments for three years have been made, it will issue a policy for three-tenths of the sum originally insured, if for four years, four-tenths, and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy."

From the fact that this stipulation appears at the foot of all the conditions, and that it was indorsed upon the policy in red ink and separately signed by the president and secretary of the defendant, the learned counsel for the plaintiffs very ingeniously argued that the contract of life insurance

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under consideration was in part with the person whose life was insured and in part with the beneficiaries named in the policy; and that, as between them and the company, it was divisible so that, after the payment of the third annual premium, the contract could not be terminated by the company for a violation, by the person whose life was insured, of any of the conditions, except on notice to the beneficiaries. No such notice having been given, it was further argued that the policy continued in force up to the 1st day of October, 1876; and that on that day the beneficiaries were in a position to elect to omit the payment of the premium falling due upon that day, and to demand a new policy for the full value acquired under the old one, without further charge, there being no outstanding notes for premiums given by them or the insured.

To test the soundness of this argument, I have made quite an extensive and critical examination of all the conditions of the contract of insurance and their bearing upon one another, as well as their collective force and effect. Some, as already stated, are contained in the body of the policy, and the remainder, partly by way of reiteration and partly by way of explanation and qualification, are printed under the general title of "conditions of insurance" upon the back of the instrument. But the latter are referred to in the body of the policy as constituting part of the same, and hence all the conditions are to be treated as if they appeared in their appropriate places in the body of the instrument. Considered with reference to their general legal effect, some bear the character of conditions precedent, or active conditions, the performance of which is essential to give a right of action, while others, being of a restrictive character, declare the instances on the occurrence of which the policy was to become void. The breach of the latter discharges the liability when once created by the performance of the active conditions. Upon the foot of all is the saving clause in favor of the continuance of the policy after the receipt of at least three annual premiums.

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But this clause is available to the person whose life is insured, as well as to the beneficiaries. It is not a separate contract, because, standing by itself, it has not sufficient meaning, nor is it capable of separate execution or enforcement. It was manifestly designed to be a part of the original contract since it refers to the policy in express language, and by its express language it was to bind the company only in case the policy ceased in consequence of the non-payment of premiums.

Time and space do not permit me to discuss the other conditions more fully than I have done. It is sufficient to say that nothing can be found in them, or any of them, which warrants the conclusion that there was a contract with the beneficiaries separate and apart from that made with the person whose life was insured, or that they acquired any vested rights after the payment of the third annual premium, which could not be divested by a subsequent breach of a condition not covered by the saving clause, or that they were entitled to notice of the election of the company to treat the policy as at an end in case of a violation of any of its conditions not embraced in the clause last referred to. The policy and all the conditions contained in and upon it, together constitute the contract, and only one contract, upon which the rights and liabilities of all parties depend.

Taken as a whole, therefore, and the only safe rule after all is to always take the whole contract as written, subtracting nothing therefrom, adding nothing thereto, the general plan and scheme of the policy and the plain intent of the contracting parties was, that if, after three annual payments had been made, the policy should lapse in consequence of the non-payment of premiums falling due, the company should not be in a position to enforce the absolute forfeiture of all the premiums received, provided all the other conditions, upon the observance of which the life of the policy depended, had been complied with. But in case any of these other conditions had been violated, the policy should become null and void without notice to any of the parties interested. The lia-

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bility of the company could become absolute only on the happening of a certain event, and not even then, unless the assured had done certain acts and had refrained from doing certain others. What he was required to do and what he was prohibited from doing were conditions of liability agreed to by all parties in interest, and no court has the right to impose other or additional ones. Such conditions are essential parts of the contract. They qualify the entire contract, and upon a violation of any of the prohibitory clauses, the contract, by its terms, becomes *ipso facto* void (*Evans* agt. *United States Life Ins. Co.*, 6 *N. Y. Supreme Ct. R.* [*T. & C.*], 331; *Rainsford* agt. *The Royal Ins. Co.*, 33 *N. Y. Superior Ct. R.* [1 *J. & S.*], 453; *affirmed*, 52 *N. Y.*, 626; *Ritzler* agt. *The World Mut. Life Ins. Co.*, 42 *N. Y. Superior Ct. R.* [10 *J. & S.*], 409; *Foot* agt. *The Aetna Life Ins. Co.*, 61 *N. Y.*, 571).

Plaintiffs sue as assignees of Tweed, and as beneficiaries named in the policy. According to the proofs, the eight annual premiums that were paid, were paid by them. It may be a great hardship for them to find that the whole of these payments were made in vain, and that the policy which is labeled as an endowment policy wholly failed to secure for them any endowment whatever. Indeed, to call a policy like the one in question an endowment policy is a misnomer. But the court can only carry into effect the contract as they made it, and as thus made they stand in no better position than Tweed would have stood if he had brought the action. The courts cannot make contracts for the parties, nor alter or vary those made by them. The law, it is true, frequently supplies, by its implications, the want of express agreements between the parties. But it never overcomes, by its implications, the express provisions of the parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put if they had been silent. The plaintiffs, even if they be regarded exclusively in the light of beneficiaries, chose Tweed as the subject

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of risk under certain conditions which they agreed to accept. He violated them, and his breach is their breach. By such breach the policy by its express terms became null and void.

The policy having come to an end in consequence of Tweed's flight to Spain without the consent of the company, it is not necessary to examine whether or not his return to New York on board the Franklin, which made the journey by a circuitous route partly by steam and partly under sail, violated another provision of the policy which required that the party whose life was insured when traveling should proceed by the usual mode of conveyance for travelers.

In any aspect of the case the policy ceased to exist by Tweed's travels upon the ocean to reach Spain, and hence on the first day of October, 1876, there was no policy in force on which the premium could be paid. It had become null and void, and it could only be revived by the mutual agreement of the parties. No such agreement having been made, and there being no waiver of the violation, the plaintiffs could not, by electing on the 1st of October, 1876, to omit to pay the premium due on that day, impose upon the defendant the liability to issue a new policy for eight-tenths of the sum originally insured. Even if it could be done, the new policy would be in the same form as the old one, and consequently it would be broken the moment it was given.

The defendant is entitled to judgment, dismissing the complaint with costs.

Guillotet agt. The Mayor.

N. Y. COMMON PLEAS.

JOSEPH GUILLOTET agt. THE MAYOR, &c., OF NEW YORK.

Action for an injury to the person — Statute of limitation.

Though the legislature may not pass a law impairing the obligation of contracts, it unquestionably has power to pass a statute which shall operate *retrospectively*, and sweep away any right of action that arose from a *tort*. The injury alleged occurred on the 18th day of March, 1873. At that time sections 74 and 91 of the Code of Procedure provided that an action for an injury to the person might be brought within six years after the cause of action accrued. This action was not commenced until the 7th of April, 1877. Before the action was begun, and on the 28th day of May, 1876, the legislature amended the Code by enacting that an action for an injury to the person should be brought within one year. The defendant pleaded the one-year statute of limitations.

Held, to be a good defense.

The statute of limitations acts *retrospectively*, for the rule is that that statute of limitations which is in force at the commencement of the action governs the rights of parties therein.

It seems that, if the effect of the statute impairs the obligation of contracts, the statute is *void*; but if the statute destroys a cause of action founded upon a tort, it is not for that reason *invalid*.

Trial Term, April, 1878.

VAN HOESSEN, J. — The jury found in favor of the plaintiff, and awarded him \$500 damages. The injury, which the plaintiff alleges was occasioned by the negligence of the defendant in permitting a nuisance to exist in the streets of this city — an allegation which the jury have found to be true — occurred on the 13th day of March, 1873. At that time sections 74 and 91 of the Code provided that an action for an injury to the person might be brought within six years

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after the cause of action accrued. The plaintiff did not begin his action until the 7th day of April, 1877, more than four years after the cause of action accrued. Before the action was begun, and on the 26th day of May, 1876, the legislature amended the Code by enacting (*see sec. 7, chap. 431, Laws of 1876*) that an action for an injury to the person should be brought within one year after the cause of action accrued. One year was the period of limitation, therefore, when this suit was commenced. On the 22d of May, 1877, the period of limitation for the bringing of an action for injury to the person was changed to three years, but that change has no bearing on this action. The defendants pleaded the one-year statute of limitations, which was in force, as I have already said, at the time this action was begun, as it was at the time the answer was interposed.

The sole question is, is the action barred by virtue of the one-year limitation enacted in 1876? The counsel for the plaintiff contends that the amendment of 1876 is not to have a retrospective operation, so as to act upon causes of action which existed prior to its passage; and he cites the cases of *Dash agt. Van Kleeck* (7 Johns., 477) and *Sackett agt. Andrews* (5 Hill, 334-337), which declare the general rule that a statute subsequently passed shall not take away a right of action already vested. With respect to causes of action not founded upon contract, the rule referred to is simply one of construction. There is no inhibition in the Constitution against depriving a person of a cause of action originating in a naked tort. Though the legislature may not pass a law impairing the obligation of contracts, it unquestionably has power to pass a statute which shall operate retrospectively, and sweep away any right of action that arose from a tort (1 *Kent Com.*, mar. p. 409; *Satterlee agt. Matthewson*, 2 Peters, 380; *Baltimore R. R. Co. agt. Nesbit*, 10 How. [U. S.], 395). But the rule enounced in *Dash agt. Van Kleeck* and *Sackett agt. Andrews* is undoubtedly correct, that unless it is plain that the legislature intended that an act should have a retroactive

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effect, the courts will so construe it that it shall not destroy or impair existing rights of action, whether they be *ex contractu* or *ex delicto*. It is now well settled that a change in the statute of limitations does not impair the obligations of a contract where it merely affects the remedy. But if, under pretense of amending the statute of limitations, the legislature really deprives a party of his right of action for the breach of a contract, it then becomes the duty of the courts to pronounce the statute unconstitutional and void. If, for instance, the legislature should enact that no action upon a past due bond and mortgage should be maintained unless brought within one week or two weeks from the time of the passage of the act, the courts would declare such legislation to be invalid (*Berry* agt. *Ramsdell*, 4 *Metc.* [Ky.], 296; [U. S. *Sup. Ct.*], *Edwards* agt. *Kearzy*, 17 *Albany Law Jour.*, 347).

Now, the effect of the amendment of 1876 was, in this case, virtually to destroy the plaintiff's right of action. That amendment was passed May 26, 1876, and it went into effect on the first of July following. It gave the plaintiff one month and four days within which to bring his action, a time which seems to me unreasonably short. In the case of *Berry* agt. *Ramsdell*, cited above, the court of appeals of Kentucky held thirty days too short a time for the people of that state to learn that a new statute of limitations, the effect of which would be to bar many existing claims, was then to go into operation. Although the intelligence of the people of New York, and the enterprise of the journalists of this city, makes it probable that the bar and the public learn of the changes in the law more promptly than any other community, I think one month is too little time to give for discovering of amendments to the Code, and for the bringing of actions to evade their operation; and if this were an action on contract, I should upon that ground overrule the plea of the statute of limitations. But this is an action *ex delicto*. It was competent for the legislature, therefore, to take away the plaintiff's cause of action. An amendment of the statute of limitations

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always operates on pre-existing causes of action. The statute of limitations acts retrospectively, for the rule is, that that statute of limitations which is in force at the commencement of the action governs the rights of parties therein (6 *How. [U. S.]*, 550). If the effect of the statute impairs the obligation of contracts, the statute is void. If the statute destroys a cause of action founded upon a tort, it is not, for that reason, invalid. As the statute of limitations always acts upon existing causes of action, the legislature must be deemed to have contemplated and intended that result, if the effect of an amendment to the statute is the absolute destruction and taking away of a right of action for a tort. The statute of limitations appears to me to be a good defense to this action, and there must be judgment for the defendant.

People *ex rel.* Martin agt. Dorsheimer.

SUPREME COURT.

THE PEOPLE *ex rel.* GEORGE MARTIN agt. WILLIAM DORSHEIMER and others, commissioners of the new capitol, and JAMES W. EATON, superintendent.

New state capitol—Contracts—Meaning of lowest responsible bidder.

It is provided by chapter 634 of Laws of 1875 (pages 809, 810) that all contracts for work to be done upon the new capitol shall be awarded to the lowest *bona fide* responsible bidder or bidders.

Held, that the statute requires the successful bidder to be a *responsible* one, that is "able to respond or to answer in accordance with what is expected or demanded," in addition to the giving of the bond for the faithful performance of the contract.

He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract.

Where the contracting board has passed upon the *pecuniary responsibility* of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere so long as there has been no abuse of discretion.

Special Term, April, 1878.

MOTION for a peremptory *mandamus* to compel respondents to award a contract to the relator.

Miller, Parker & Newcomb, for relator.

A. Schoonmaker, Jr., attorney-general, for respondents.

Matthew Hale, for parties to whom contract was awarded.

WESTBROOK, J.—The papers show that the respondents advertised for sealed proposals to do certain carpenter work

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upon the new state capitol, reserving, among other things, the right to reject any bid. The relator's bid was the lowest sent in, but was rejected upon the ground of his pecuniary irresponsibility, though it is conceded that the security, which he offered in the form of a bond for the faithful performance of the work, was ample.

The application for a *mandamus* is resisted upon several affidavits showing the pecuniary condition of the relator, and establishing the fact that in rejecting the bid the respondents passed upon the question of the relator's pecuniary responsibility, and rejected it because their conclusions was unfavorable to him in that particular. The relator insists that his bid was *bona fide*, and that he is to be deemed a responsible bidder because he offered adequate security for the performance of the contract. This claim is resisted by the respondents. Its validity depends upon chapter 634 of Laws of 1875 (pages 809, 810), which declares: "All contracts shall be awarded to the lowest *bona fide* responsible bidder or bidders, after being advertised by the superintendent in the state paper once in each week for four weeks consecutively, immediately preceding the letting of the contract. The notice of letting to be signed by the superintendent, who shall state the work to be let, the quality, quantity and kind of material to be bid for, and the length of time which will be given for the completion of the work or the delivery of materials, the amount of security required, the bonds to be furnished for the faithful performance of the contract."

Without elaborating the argument, it seems to be clear that the statute intended that the contractor should be a party of pecuniary responsibility, and that, in addition, he should give a bond for the faithful performance of his contract. The good sense of this (and it involves no reflection upon the poorer mechanics) is obvious. Though a person may be able to give security to his employer, yet his ability to do and perform with promptness a heavy contract, involving large expenditures, must depend greatly upon his own resources. For this

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reason, it is assumed that the statute required the successful bidder to be a "responsible" one, that is to say, "able to respond or to answer in accordance with what is expected or demanded" (*see Webster's Dictionary*), in addition to the giving of the bond for the faithful performance of the contract. Of that responsibility the contracting board must judge. While it is not held that in a clear case the court would not interfere with its action, yet it is manifest, upon a perusal of the affidavits which have been submitted, that there has been no such abuse of official discretion and judgment in this case as will justify such interference.

For the reason above stated, the peremptory *mandamus* must be refused. There is, however, another point worthy of consideration. Section 2 of chapter 7 of Laws of 1878 provides: "The said new capitol commissioners are hereby directed to take such measures as shall insure the completion and finishing of that portion of the new capitol containing the assembly chamber for occupation on the 1st day of January, 1879, by the senate and assembly." It was for the work to be done upon that portion of the new capitol containing the assembly chamber for which bids were made. Manifestly, the section gives a large discretion, for they are "directed to take such measures as shall insure the completion and finishing" of the work by a given time. To secure that end, the board has deemed it wise to discriminate as to the men to be employed. As efficiency and promptness in doing any work must depend largely upon the man who does it, having reference to his integrity, ability and responsibility, the board was authorized to discriminate between bidders. So long as there has been no abuse of discretion, but only honest action to carry out legislative will, the court will not interfere.

The motion for a peremptory *mandamus* is denied, with ten dollars costs, to be paid by the relator.

Dugan agt. Brophy.

N. Y. COMMON PLEAS.

PHILIP DUGAN and another agt. MARY C. BROPHY, MICHAEL
T. BROPHY, JAMES CROW, EDWIN TERRY and others.

Form of notice under mechanic's lien law.

The statutory lien afforded by the mechanic's lien law of 1875 is *strictissimi juris*, and can only be made effectual upon substantial compliance with its provisions in all matters in respect to which it had in express terms exacted positive and direct statements as to the particulars specially mentioned, as opposed to mere legal inferences from other matters more or less distinctly or indistinctly asserted, or directly or inferentially inferable from such as are stated. The statute must be strictly construed.

The vendor under contract to sell and make advances to aid the vendee to erect a building upon the premises is not liable as *owner* under the act of 1875.

The notice under this act is defective where it fails to state "the terms, time given and conditions of the contract" of the plaintiff, made with the contractor, against whom, by the notice filed, claim is made for the alleged debt due the plaintiffs.

The statute in these special enactments as to the particulars required by the fifth section of the act of 1875 is not content with such legal inferences as might be drawn from facts stated in general terms, but exacts a *direct, precise and positive statement* of the following particulars, to wit: "That the demand made is in exclusion of all just credits and offsets;" "of the name of the person (as principal) by whom the lienor was employed or to whom he furnished the materials;" "of the terms, time given and conditions of the contract;" "and whether all the work or materials for which the claim is made has been actually performed or furnished, and if not, how much of it."

A notice under the mechanic's lien law, which does not conform strictly to the foregoing requirements, is defective, and renders any lien sought to be established, ineffectual and void.

Special Term, March, 1878.

Dugan agt. Brophy.

D. M. Carpenter, for plaintiff.

Kneeland & Carter, for defendants Crow and Brophy.

Daniel T. Robertson, for defendant Edwin Terry. *S. F. Kneeland* of counsel.

ROBINSON, *J.*—This action is predicated upon an alleged mechanic's lien claimed to have been imposed under the act of 1875 (*chap. 379*).^{*} The demurrer of the defendant Mary C. Brophy (the admitted owner of the premises upon which the lien is claimed) to the complaint must be sustained. As owner her interest could only be made subject to such lien, when she stood in the position of a person whose property could be affected thereby, and a notice of lien had been filed with the county clerk which substantially complied with the provisions of the act. That which was filed by and in behalf of these plaintiffs was defective in failing to state, as required by section 5 of the act, "the terms, time given and conditions of the contract" of the plaintiff made with Michael T. Brophy and James Crow, composing the firm of Brophy & Crow, against whom, by the notice filed, claim is made for the alleged debt due the plaintiffs. It also asserts that the work and labor and materials for which the claim is made were done and furnished by them to the said firm of Brophy & Crow, at the instance of said Mary C. Brophy, but in what relation or connection or how she promoted and instigated the transaction in any legal relation of owner contracting with them for the erection of the building, or as vendor, contracting with them to sell them the premises on a building loan, or how otherwise, is in no way suggested.

In the recent case of *Burbridge* agt. *Marcy* (54 *How.*, 466), decided by me in February, 1878, I had occasion to examine the relation of such a vendor, under contract to sell and make advances to aid the vendee to erect a building upon the premisses, and held him and his estate exempt from any lien created under the act of 1875.

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Nothing in the notice of lien in question indicated how or to what, if any, extent the estate or interest of Mary C. Brophy in the land was or could be affected by or under any of the provisions of this statute. So, too, the notice stated that "such work, labor and materials was done and furnished under and in pursuance of the terms of the following contract, viz.: To do all work and furnish materials for all the cornices, gutter leaders and roof, in and upon the construction of a certain building hereinafter described, for the sum of one hundred and ninety dollars; that the sum of seventy dollars has been paid thereon and that the sum of one hundred and twenty dollars is now justly due thereon, over and above all offsets and claims and deductions." I am of the opinion this notice does not comply with the requirements of the act in failing to state whether it was made with or by Brophy & Crow, as principals, or as agents of Mary C. Brophy, so that she was their debtor, or as contractors under her, or what were the terms, time given or conditions of the contract, or whether all the work, labor and materials contracted for had been actually performed or furnished. In this latter respect no such allegation is contained in, or necessarily results from, the general averment that the amount payable to plaintiffs under the contract was due, or what was done and furnished was, in pursuance of the terms of the contract, *non constat*, payment might have been exacted, by the terms of the contract, before complete delivery or some special contingency, or on delivery of each item, as on a severable contract for the payment of each delivery thereof. How the payments were to be made, what terms of credit were given and what were the conditions of the contract are not set forth. The statute in these special enactments as to the particulars required by the said fifth section is not content with such legal inferences as might be drawn from facts stated in general terms, but in the foregoing particulars exacts a direct, precise and positive statement of these particulars, to wit, that the demand made is in exclusion of all just credits and offsets, "of the

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name of the person (as principal) by whom the lienor was employed or to whom he furnished the materials," "of the terms, time given and conditions of the contract," "and whether all the work or materials, for which the claim is made, has been actually performed or furnished, and if not, how much of it."

In the case of *Diossy agt. Martin* (reported in the *Daily Register*, March 16, 1876) I had occasion to consider the mechanic's lien law of 1875, and then held that the statutory lien thereby afforded was "*strictissimi juris*" and could only be made effectual upon substantial compliance with its provisions in all matters in respect to which it had, in express terms, exacted positive and direct statements as to the particulars specially mentioned as opposed to mere legal inferences from other matters more or less distinctly or indistinctly asserted, or directly or inferentially inferable from such as were stated. The proceeding to establish such a lien is not one within the general province of remedial justice, but being, *in invitum*, interposed by force or virtue of a special statute infringing upon the common-law right of the owner of real estate, and must, therefore, be strictly construed. The notice of lien under consideration being, in these views, wholly ineffectual to impose any lien upon the estate of Mary C. Brophy in the land, or of any interest Brophy & Crow had in it in any relation to it as purchasers, lessees or otherwise, no right to the enforcement of any lien in the land is suggested in any such terms of legal efficacy, that they could be enforced by a court of equity by way of foreclosure of a lien thereon. Nor can any obligation for the alleged debt, as against Mary C. Brophy or Brophy & Crow, be enforced upon the uncertain and ambiguous allegations that Brophy & Crow acted either as the agent of Mary C. Brophy (upon any unknown agency) or as contractors. No such contract is suggested or disclosed; no legal obligation as debtors claimed, as against either of these parties, upon any valid legal obligation asserted in the pleading. As to them, therefore, the

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demurrers must be sustained; so as to the defendant Terry brought into the controversy as having claim upon or interest in the lot upon which the lien is sought to be established. Such lien being held ineffectual and void no cause of action exists as against him.

The several demurrers of Mary C. Brophy, of Brophy & Crow, and of Edwin Terry sustained with leave to amend the complaint on payment of costs within ten days after the service of notice of order herein; otherwise judgment absolute.

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SUPREME COURT.

HENRY D. BICKETT agt. WILLIAM L. TAYLOR and another.

Stock brokers—agreement to carry stock on margin—right to sell when margin not kept good—evidence as to circumstances under which written instrument was executed—nonsuit.

It is competent for a party to show any facts and circumstances surrounding the making of a contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable.

It is an elementary rule of construction that every written instrument should be interpreted in the light of the circumstances surrounding its execution, and it is error for the court to exclude evidence of the circumstances under which the instrument was executed.

It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit.

General Term, First Department, March, 1877.

APPEAL from judgment entered upon dismissal of the complaint at circuit. The facts fully appear in the opinion.

Freling H. Smith, for plaintiff, appellant.

I. The court erred in excluding evidence of the circumstances under which the contract was executed, and that it was intended by the parties only to apply to the stock which defendants were carrying for plaintiff at the time of its execution. It is an elementary rule of construction that every written instrument should be interpreted in the light of the circumstances surrounding its execution, which may always be proved to place the court in the situation of the parties and enable it to apply the instrument to its subject-matter

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(*Bancroft agt. Winspear*, 44 *Barb.*, 209; *Blossom agt. Griffin*, 3 *Kern.*, 569; *Hanck agt. Craighead, &c.*, 8 *Hun.*, 237; *Griffiths agt. Hardenburgh*, 41 *N. Y.*, 464; *Matter N. Y. C. R. R. Co.*, 49 *id.*, 414 [419]; *The Western N. Y. L. I. Co. agt. Clinton et al.*, *Ct. App.*, June, 1876; 2 *Phil. Ev.*, 531; *Parsons on Contracts*, vol. 2. p. 499 [5th ed.]).

II. The court erred in holding as matter of law that the contract of February 24, 1870, applied to and governed the transactions in question. The contract by its terms relates solely to the account existing between the parties *at the time of its execution*. It authorizes defendants, if plaintiff fails to comply with its terms, "*to close his account*," *to discontinue the transaction, &c.* Plaintiff closed the "account" with defendants, to which this contract applied, in the spring of 1870, and had no transactions or dealing, or account of any kind whatever, with them, for two or three years prior to purchasing the stocks in question.

III. Unless the contract was controlling on the plaintiff the defendants were bound to give him reasonable notice of the time and place of sale of the stocks, and such sale should have been held in a public place, and not in the stock exchange (*Brass agt. Worth*, 40 *Barb.*, 648; *Markham agt. Jaudon*, 41 *N. Y.*, 235).

IV. "It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit" (*Colt agt. The Sixth Ave. R. R. Co.*, 49 *N. Y.*, 671; *Lubrim agt. Koplring*, 4 *id.*, 547; *Fish agt. Davis*, 62 *Barb.*, 122 [126]; *Heyne agt. Blair*, 62 *id.*, 19 [22]; *Thurber agt. Harlem, &c., Co.*, 60 *id.*, 326 [331]; *Schenck agt. Morris*, 2 *Sweeney*, 464; *Breton agt. Baxter*, 2 *id.*, 339).

Robert Sewell, for defendants and respondents.

I. The exception to the admission of the contract of February 24, 1870, on the ground that it is not shown to relate to the transactions in suit, cannot be sustained. It is a contract for all future purchases of stocks and all future dealings

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between the parties; and unless there is clear evidence of its abrogation, it must be held to govern all after transactions between the parties (*Greenleaf on Ev.*, sec. 75.).

II. The offer to prove that the contract was executed for a special and particular purpose was properly excluded. The intention of the parties can best be seen by the contract itself. They express themselves in it as intending to cover, not only the stocks then on hand, but all which should be thereafter purchased. To attempt, as the offer does, to contradict this by oral testimony, is to subvert the most elementary principle of the law of evidence. It might have been abrogated subsequently, but that would be another question (*Bayard agt. Malcolm*, 1 *Johns.*, 467; 2 *Phil. Evid.*, 350; 2 *Stark Evid.*, 544; *Boorman agt. Johnston*, 12 *Wend.*, 573).

III. At the time of the sale of the stock by defendants, there was only four dollars and eighty-seven cents margin left. There was not a ten per cent margin. The defendants, therefore, had a right under the contract to close plaintiff's account by sale of all stocks at the brokers' board or elsewhere, in their discretion. They exercised their right on November first, and sold the stock at the brokers' board. The court could give no other direction than to dismiss. There can be no cause of action predicated on an act done under a contract, which contract is in full force. If the contract was not abrogated, then the motion to dismiss was properly granted, because, being proven to have existed, it is presumed to continue in existence until it is shown to have been abrogated (*Wilkins agt. Earle*, 44 *N. Y.*, 172; 4 *M. & G.*, 898; *Meyer agt. Hallock*, 2 *Robt.*, 284; *Cooper agt. Dedrick*, 22 *Barb.*, 516).

IV. As to the sale of the stock not being made in the proper manner, all that need be said is, that it was made under the written contract, and might have been made anywhere defendants pleased. It was made at the brokers' board, but it might have been made in the street, or at the counter of

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defendants, or anywhere else they pleased (*Markham agt Jaudon*, 41 *N. Y.*, 258 ; *Stewart agt. Drake*, 46 *id.*, 449).

DAVIS, *P. J.*—This action was brought by the plaintiffs against the defendants, who were stockbrokers, for an alleged sale, without authority, of certain stocks which they, as brokers, had purchased and were carrying for him.

It appeared in the case that, on the 24th of November, 1870, a written agreement was signed by the plaintiff in respect to certain stock transactions between him and the defendants. This agreement clothed the defendants with the greatest possible power with respect to the use and sale of the stock, and subjected the plaintiff to stringent obligations to keep his margin at all times at ten per cent. The transactions existing when that agreement was made, and the accounts in respect to them, were fully closed more than two years before the purchase of the stock in question. At the time the stock in question was bought, nothing seems to have been said with reference to the contract of 1870. After that contract had been introduced in evidence, the plaintiff offered to show under what circumstances it was made, and, in substance, that it only applied to the stocks which the defendant was then carrying, or might purchase while he was absent at the south, in case of a decline in the market below ten per cent. The court excluded this offer, and the plaintiff's counsel excepted. At the close of all the evidence in the case, the court ruled that the contract of 1870 covered all the dealings between the parties.

Counsel for plaintiff then requested the court to submit to the jury the question as to whether the contract was contemplated by the parties when the transaction in question was entered into ; also, if they found that it was so contemplated as to apply to the present transaction in its inception, whether there was not a new agreement entered into by the parties on the 19th and 20th of September, 1873, when the additional margin was deposited by the plaintiff, which was thereafter

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applicable to this transaction, and controlling upon the parties; also, whether the defendant, on the first of November, sold the stock in the proper manner, and at the fair market-price at the time of the sale.

The court declined to grant any of the above requests or to submit any question to the jury, on the ground that the rights of the parties were governed by the contract, and that there is no evidence in the case which would sustain a finding of the jury that it was rescinded or rendered nugatory, and plaintiff's counsel duly excepted.

We think the court erred in these rulings. It appeared by evidence that all the transactions existing at the time that contract was made, or which constituted continuous dealings under the then current account, had terminated, and the account was closed between the parties some two years before the transactions out of which this action arises took place. By the purchase of the stock in question the plaintiff opened a new account with the defendants; and if there be any legal presumptions (which we much doubt) that the former contract existing between the parties was thereby revived, so as to apply to and cover the new account, yet the facts and circumstances proved in the case very clearly, as it seems to us, make that question an open one of fact for the jury to determine.

It was entirely competent for the plaintiff to show any facts and circumstances surrounding the making of that contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable; that is to say, whether it was intended to apply to transactions then current between the parties and those which should grow out of their then present dealings and form a continuous account, or whether it was intended to cover any and all other transactions which might, through any indefinite period, take place between the same parties after that account had been completely closed. Besides, there was evidence sufficient to go to the jury upon the question whether or not the parties them-

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selves did not treat the transaction of 1873 as an entirely new and independent one, not governed or affected by the old contract, and this evidence ought to have been submitted to the jury. There was evidence, also, on the part of the plaintiff, tending to show that on the 19th and 20th of September 1873, a new agreement was entered into between the parties, which thereafter controlled and limited the authority of the defendants in disposing of the plaintiff's stock. This question should properly have been submitted to the jury, for, if the jury had found upon it favorably to the plaintiff, there is no reason why it should not be held to have abrogated the contract of 1870, and placed the parties in respect to the stock held, after the twentieth of September, upon an entirely different footing. The evidence upon this question was conflicting, but that fact had no effect upon the right of the plaintiff to have the question passed upon by the jury. It is at least doubtful whether the court, upon all the evidence, ought not to have held, *as a question of law*, that the contract of 1870 *had no application* to the stock purchases in 1873. The presumption of the continuance of that contract was certainly not a strong one, *under the evidence in this case*, and there was sufficient testimony tending to rebut the presumption *to render the ruling of the court as matter of law*, that that contract covered all dealings between the parties, one that cannot be sustained.

The judgment must be reversed and a new trial granted, with costs to abide event.

BRADY and DANIELS, JJ., concurred.

Mauger agt. Dick.

N. Y. SUPERIOR COURT.

VICTOR E. MAUGER agt. DUNDAS DICK.

Trade-mark — Injunction not granted to restrain publication of circular.

An equitable action will not lie to restrain the defendant from interfering with the business of plaintiff by the publication of a circular alleged to contain false and fraudulent representations that certain parties are infringing his trade-mark rights by placing on the market imitations of his soft capsules and warning the trade that the defendant had the exclusive right to use the trade-mark, "soft capsules," according to law, and that he would promptly punish, to the full extent of the law, any encroachments on his rights.

The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander.

Equitable jurisdiction to restrain the use of a name, or a trade-mark or letters, rests upon the ground of plaintiff's property in his name, trade-mark or letters and of the unlawful use thereof.

Even admitting that the contents of the circular was false, that fact does not confer jurisdiction.

Special Term, January, 1878.

THE action is brought to restrain the defendant from interfering with the plaintiff's business by threats, circulars and suits.

It appears, from the pleadings and the testimony, that the defendant, under the name of Dundas Dick & Company, in the year 1865, began the business of preparing and offering to the drug trade soft capsules, and that the plaintiff, from that time up to January, 1877, acted as general agent for the defendant for the sale of the said goods.

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Capsules, hard and soft, are known as a device in pharmacy by which disagreeable medicines are enclosed in some jujube paste, or other gelatinous substance, and thereby rendered palatable when administered.

In the month of February, 1877, the plaintiff dissolved his connection with the defendant, and, under the name of "American Soft Capsule Co., Victor E. Mauger, agent," set up for himself in the same line of business; and, in May, 1877, the defendant, as alleged, falsely, fraudulently and maliciously contriving to injure the plaintiff in his business and to prevent competition, issued the following circular:

"To the wholesale and retail druggists of the United States:

"35 AND 37 WOOSTER STREET, NEW YORK, }
May 15, 1877. }

"GENTLEMEN. — We have been advised that certain parties are infringing our trade-mark rights by seeking to place in the market imitations of our soft capsules. We would therefore warn the trade of such goods, and state that since introducing our soft capsules, in 1865, we have advertised and characterized our medicines under that name, and that we have the exclusive right to use the trade-mark 'soft capsules,' according to law. Therefore, we hereby give notice that we shall punish promptly, and to the full extent of the law, any encroachments on our rights, whether such be of a direct or indirect nature, and whether by selling or offering for sale any goods of that description bearing that name and not of our manufacture.

"No soft capsules are genuine unless bearing the signature of Dundas Dick & Co. on each box.

"Yours, very respectfully.

"DUNDAS DICK & CO."

The prayer of the complaint demands judgment enjoining and perpetually restraining the defendant and his agents,

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&c., from further publishing or sending to persons or firms engaged in the drug trade in the United States the said false and threatening circular, or any other similar circular.

Edward S. Babcock, for plaintiff.

Duell, Bell & Duell, for defendants.

SPEER, J. — I am unable to perceive how the plaintiff can maintain this action on any principle of equitable jurisdiction. He does not claim to restrain the use of a name or a trade-mark or the publication of letters, but the publication of a circular containing false and fraudulent representations that certain parties are infringing his trade-mark rights by placing on the market imitations of his soft capsules, and warning the trade that the defendant had the exclusive right to use the trade-mark "soft capsules," according to law, and that he would promptly punish to the full extent of the law any encroachments on his rights. The circular is not addressed to the plaintiff, but to the trade. It is true the complaint sets forth specific instances in which the persons therein named, who had intended to make purchases of him, had been deterred therefrom by written representations of the purport set forth in the circular, and who had been induced thereby to withdraw their custom from the plaintiff. There is no reference therein to the plaintiff or his business, except as the facts might apply to him. It does not appear that the plaintiff was under any obligation or duty to protect the persons or public threatened by the circular, if they should do the acts therein denounced. The plaintiff's goods were not presented to the public by labels or boxes in which they were inclosed at all resembling the goods prepared and put upon the market by the defendant. The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor

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does it extend to cases of libel or slander. Equitable jurisdiction to restrain the use of a name or a trade-mark or letters, rests upon the ground of plaintiff's property in his name, trade-mark or letters, and of the unlawful use thereof.

The complaint alleges no trust or contract between the parties, and no use of the plaintiff's name, but only that the defendant made false and fraudulent representations that the articles manufactured by certain persons in the trade were infringements of letters-patent to which the defendant has a legal and exclusive right. If it be admitted, as claimed by the plaintiff, that the contents of the circular were false, that fact does not confer jurisdiction.

If the plaintiff has any remedy, it is by action at law (*Wolfe et al. agt. Burke et al*, 56 *N. Y.*, 115; *Boston Diatete Co. agt. Florence Man'g Co.* 114 *Mass.*, 169.)

The complaint must be dismissed.

Levy *et al.* agt. Kaim *et al.*

N. Y. MARINE COURT.

ABRAHAM LEVY *et al.* agt. ABRAHAM KAIM *et al.*

Arrest—when party may be admitted to jail liberties.

Defendants arrested in an action to recover chattels wrongfully concealed or disposed of, may, under the new Code, either give an undertaking to pay any judgment finally recovered, or be admitted to the liberties of the jail upon the ordinary limit bond.

Special Term, March, 1878.

R. Sampter, for motion.

Vanderpoel, Green & Cuming, opposed.

MCADAM, J.—In this action, which is to recover chattels wrongfully concealed and disposed of by the defendants, an order of arrest was granted bailable in \$1,500. The defendants, who are in actual custody, seek to obtain their liberty upon executing the ordinary limit bond. The sheriff opposes their application upon the ground that, under subdivision 2 of section 575 of the Code of Civil Procedure, the defendants are required to give an undertaking to pay any judgment that may be recovered in the action, and the sheriff's counsel insists that the defendants are entitled to no other relief. This is an error. The provision cited applies only to cases where the defendants ask to be discharged upon bail. Section 149 of said Code provides that "a person in the custody of a sheriff, by virtue of an order of arrest, or of an execution in a civil action, or in consequence of a surrender in exoneration of his bail, is entitled to be admitted to the liberties of the jail upon executing a bond to the sheriff, as therein pre-

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scribed." This section, which is new, extends the liberties of the jail to defendants in custody under orders of arrest as well as under final process. The next section (150) provides the form of the bond, which must be "conditioned that the person so in custody shall remain a prisoner, and shall not, at any time or in any manner, escape or go without the liberties of the jail until discharged by due course of law." Sections 149 and 575 are not in conflict. The distinction between them is that, under the bail bond required by section 575, the defendants are discharged from the arrest (*see sec. 573*), while under the limit bond the defendants remain under arrest and are merely admitted to the liberties of the jail (*sec. 149*), which in the city and county of New York embrace the whole of that city and county (*sec. 145*). The sheriff will, therefore, be directed to discharge the defendants upon receiving the undertaking required by section 575, subdivision 2, or to admit them to the liberties of the jail upon the limit bond provided for in sections 149 and 150 (*supra*).

Ordered accordingly.

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SUPREME COURT.

THE MAYOR, &C., OF THE CITY OF NEW YORK agt. THE
UNION FERRY COMPANY.

Officers of municipal corporation — their duties — action in equity to set aside conveyances — remedy at law — cloud upon title — Ferry franchise — action by municipal corporation for — relief against acts of municipal officers — Pleading.

Persons appointed by statute to hold official relations to a municipal corporation and charged with specific trusts and duties in respect to its property and its application, must act in conformity with the law which appoints them. When they act otherwise it is a breach of trust and abandonment of duty.

Hence, held, that a lease of ferries for a term of years, made by the commissioners of the sinking fund of the city of New York, at a nominal rent of one dollar per annum, the annual rent of which was of the value of more than \$100,000, was void; the rents being pledged by law to the sinking fund for the payment of interest on the funded city debt, it was the duty of the commissioners to obtain the rental value of the ferries.

An application to a court of equity for the cancellation of a deed is not a matter of right. It rests with the sound discretion of the court, according to what is reasonable under the circumstances of the particular case, whether the relief shall be granted or refused. The jurisdiction of the court is protective, preventive and remedial.

Where the law affords an adequate remedy equity will not interfere. But where adequate remedial justice is not complete at law, or is in doubt, equity will interfere and grant relief (*Vide, Mayor, &c., of N. Y. agt. North Shore Staten Island Ferry Co., post p. 154*). Ejectment will not lie for the recovery of a ferry franchise.

Where, in an action to set aside a deed as invalid, the relief depends upon facts extrinsic thereto such facts must be set up in the complaint.

An action in equity will lie to set aside a lease of ferries, illegally made, as a cloud upon the title (*Smith agt. The Mayor of N. Y., 68 N. Y., 552; Town of Venice agt. Woodruff, 82 id., 470; N. Y. and N. H. R. R. Co. agt. Schuyler, 17 id., 592*).

The municipal corporation stands in such relation to the ferry franchises

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that it may properly ask a court of equity to examine into the validity of conveyances thereof made by its officers and seek to have deeds which convey away such property to the injury of tax-payers and creditors, and which are void or voidable, canceled and delivered up so that the property may be applied to the purposes to which it has by law been pledged.

Special Term, New York, June, 1877.

MOTION at the trial to dismiss the plaintiff's complaint.

George Ticknor Curtis, for plaintiff.

Charles E. Miller and *Benjamin D. Silliman*, for defendants.

VAN VORST, J. — After a careful consideration of the complaint and the argument of the learned counsel for the defendant in support of their motion to dismiss the same, I am of the opinion that the motion ought not to be granted.

The action is brought for the purpose of obtaining an adjudication that a lease from the plaintiff "by the commissioners of the sinking fund" to the defendant, made May 1, 1871, by which certain ferries and their appurtenances were leased to the defendant for a period of ten years at the nominal rent of one dollar per annum, upon the condition of a concession in the way of fares to persons using the ferries during certain hours of the day, should be canceled and the ferries and their appurtenances delivered up.

It appears from the complaint that the plaintiff is the owner of the ferries; that at the time of the making of the lease the rents of the same were pledged to the "sinking fund" to be applied to the payment of the principal and interest of the city stocks for the benefit and relief of the inhabitants and tax-payers of the city of New York; that the defendants, from May 1, 1861, to May 1, 1871, held a lease from the plaintiff of these ferries, paying therefor an aggregate rent of \$103,000 per annum, which rent was paid and received for the use of the commissioners of the sinking fund.

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That at the time the lease complained of was made the ferries and appurtenances were worth for a term of ten years from May 1, 1871, and ought to have produced to the city, a rent of \$150,000 per annum for the use of the commissioners of the sinking fund.

That by force of ordinances of the city, confirmed and ratified by laws of the state, it was the duty of the commissioners of the sinking fund, officers appointed and designated by law, to collect, receive and apply the rents of the ferries to the payment of the interest accruing and to accrue on numerous funded debts and stocks of the city of New York outstanding and held by numerous persons, creditors of the city.

It cannot be otherwise than that the commissioners of the sinking fund were under a duty to the city of New York, its inhabitants and its creditors, to obtain the rental value of the premises.

It cannot be claimed, in reason, that they could give away a valuable franchise which had in the past yielded as rent over \$100,000 per annum, and which was in fact worth over \$150,000 per annum at the time of making of the lease.

If they could make such gratuitous disposition of the ferry franchise there is no reason why they might not do the same with respect to other property of the city. If they could make this lease at a nominal rent upon a condition that persons using the ferries during certain hours of the day should be favored in the way of fares I do not see but that they could lease valuable lands and buildings owned by the city at a dollar a year upon the condition that their lessees should let the same to under-tenants at low rents.

It is manifest that the commissioners of the sinking fund stood in no such relation to these ferries as to be justified in disposing of them at a nominal rent, in order that they might secure advantages to persons using the same during certain periods. They were under no duty and had no power to sacrifice the interests of the inhabitants of New York and its

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creditors to secure advantages and concessions of this nature to limited numbers of persons traveling over the ferries.

Persons appointed or designated by statute to hold official relations to a municipal corporation and charged with specific trusts and duties in respect to its property and its appropriation, must act in conformity with the law which appoints or designates them.

They can legally perform no duty other than that enjoined or reasonably implied from the terms of the statute appointing them.

The corporation is bound only by the authorized acts of its officers and agents (*Brown agt. The Mayor, &c.*, 63 *N. Y.*, 243; *Weismer agt. Village of Douglas*, 64 *id.*, 105). When they act otherwise it is a breach of trust and abandonment of duty, and the action itself is a violation of public policy.

It cannot but be considered that the disposition of these ferries at a nominal rent, upon the conditions imposed and above referred to, are an unlawful withdrawal of the revenues which belong to, and should be collected for the use of, the sinking fund created for the discharge of the city debt.

But it is urged by the learned counsel for the defendant that the invalidity complained of appears upon the face of the lease and that a court of equity will not order an instrument to be delivered up and canceled which, upon its face, is plainly illegal and void and against public policy. In the lease itself there is no invalidity appearing.

The rent reserved, it is true, is stated to be one dollar per annum. This the lease shows, but it is not necessarily void for that reason. The reservation of a rent of one dollar per annum may, in the law, be a good consideration. *Non constat* it is not all the franchise is worth and sufficient to uphold the instrument.

It is only when the extrinsic fact is stated and proved that the premises were worth \$150,000 per annum that the invalidity of the transaction appears.

By such extrinsic fact, for the purposes of this motion.

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admitted, the injury to the sinking fund appears, and the lease is shown to have originated in a breach of duty, and to be opposed to public policy.

An application to a court of equity for the cancellation or delivering up of instruments is not, strictly speaking, a matter of absolute right. It is a matter of sound discretion to be exercised by the court, either in granting or refusing the relief prayed, according to its notion of what is reasonable and proper under all the circumstances of the particular case (*Story's Eq. Jur.*, vol. 2, sec. 693).

This is not an arbitrary discretion, however; but is to be judicially exercised (*Hamilton agt. Cummings*, 1 *Johns. Chy.*, 517).

The exercise of jurisdiction in cases of this character is protective and preventive. It is also, in a true sense, remedial.

The rule, doubtless, is that where the law affords an adequate remedy for redress, equity will not interfere and decree the cancellation of an instrument.

But where remedial justice, adequate for the protection of the party, is not complete at law or is in doubt, the interposition of a court of equity may be invoked.

I cannot find that the plaintiff has any adequate remedy at law.

An action of ejectment cannot be maintained.

No action of ejectment can be brought for the recovery of a ferry franchise which ranks as an incorporeal hereditament. Ejectment can be brought only for corporeal hereditaments (*Rowan agt. Kelsey*, 18 *Barb.*, 488).

Things which lie merely in grant are not the subjects of an action of ejectment, because these being incorporeal things, are in their nature invisible, and therefore not capable of being delivered in execution (*Bacon's Abt., Ejectment, D*).

The right to review the proceeding by *certiorari*, were it otherwise effective, is gone. In analogy to the limitation of a writ of error, the writ of *certiorari* will not be granted after two years (*Ex parte Elmendorf and others agt. The Mayor*

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of *New York*, 25 *Wend.*, 693; *The People* agt. *The Mayor, &c.*, of *New York*, 2 *Hill*, 10).

I am, therefore, persuaded that the plaintiff's only remedy is through this action brought for a cancellation of the lease.

It is objected by the counsel for the defendant that there is no allegation in the complaint that the claim of the defendant is valid upon the face of the lease; that there is no averment that extrinsic facts are necessary to be proved in order to establish its invalidity or illegality; that it is not alleged that the lease is apparently within the powers of the corporation or of the commissioners of the sinking fund, and in support of their view as to the necessity of such allegation they refer to the case of *Heywood* agt. *The City of Brooklyn* (14 *N. Y.*, 634).

It cannot be that any particular words must be used in setting up a cause of action for equitable relief in cases of this character.

Facts are to be pleaded and not conclusions, and relief must be awarded such as the facts justify.

The power of the commissioners is shown by the complaint, and the lease which is annexed is valid in form and execution. Certain collateral facts are stated in the complaint which do not appear upon the face of the lease. It is true that the pleader does not call them extrinsic facts, nor does he state the necessity of proving them. But the simple statement of the facts invests them with their true character and relation to the lease.

The defendant's counsel further contends, in alluding to the plaintiff's claim in the complaint, that the lease is a "cloud upon the plaintiff's title to the ferries; that no cloud can be cast upon the title to an incorporeal hereditament or franchise, and that the jurisdiction of a court of equity for the removal of clouds upon title applies only to deeds, instruments and proceedings which affect real estate."

I am referred to the case of *Smith* agt. *The Mayor, &c.*, of *New York*, in the court of appeals, decided in February,

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1877, a copy of which in manuscript has been handed up in support of this position (*Smith agt. The Mayor, &c.*, 68 *N. Y.*, 552).

I do not understand it to be absolutely held in that case that an action in equity cannot be maintained to remove a cloud upon the title of property other than real estate. EARL, J., does say that the attention of the court has not been called to any case where an action has been maintained to remove a cloud upon any title except real estate. He, however, adds: "But there may be some property or rights not real estate over which a cloud may be cast, which a court of equity will remove."

The ferry franchise existing in the municipal corporation plaintiff, is both a property and a right within the terms used by EARL, J.

In speaking of the grants to the city of New York of the right to establish ferries, Chancellor KENT, in his notes upon the Montgomerie charter, says: "They are grants of corporate franchises partaking of the nature of private property. They confer on the inhabitants of New York vested and valuable interests arising from the rents and profits of every ferry established or to be established under the charter" (*Davies' Laws of New York*, 214, n. 30, p. 226; *Hoffman's Treatise on the Estate and Rights of the City of New York*, 1862, pp. 273-303; *Mayor, &c., of New York agt. N. Y. and S. I. Ferry Company*, 40 *Superior Ct. R. [J. & S.]*, 232; *opinion, MONELL, C. J.*).

The case of *The New York and New Haven Railroad Company agt. Schuyler* (17 *N. Y.*, 592) was one brought to have certain spurious certificates of stock in a railroad company removed as clouds upon the title of the genuine stockholders. It was upheld upon that ground. In that case it is stated the existence of these shares is unjust "because it must, of necessity, exercise a most depressing influence upon the real stock of the corporation;" and again "we can scarcely err in supposing that,

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on the discovery of these frauds, every share of valid stock must at once have lost nearly one-half of its market value; that depression must continue in a greater or less degree, while these certificates are allowed to stand. These shares of stock are a description of property as much entitled to invoke the protective remedies peculiar to the courts of equity as any other."

In *The Town of Venice agt. Woodruff* (62 N. Y., 470), RAPALLO, J., in commenting upon the case above mentioned, says: "The spurious shares were held to be a cloud upon the title of the holders of the genuine shares."

In the case under consideration the lease has done more than cast a cloud over the plaintiff's title. It is not a threatened injury through the lease which is apprehended, but there is an accomplished evil.

It is not like the case of an illegal assessment threatened to be collected, or an invalid instrument liable to be enforced, and which throws a shade over a title or interest, and which equity is asked to restrain and remove.

The complaint shows that, by an agreement valid on its face, the franchise of the ferries for a period of ten years has actually passed to the defendant, and that the lessee is in the actual use and uncontrolled enjoyment of the subject of the lease.

The fact, however, that the lease no longer throws a shade only over the plaintiff's title, but has conferred upon the defendants the substantial enjoyment of the property under a claim of right based upon the lease, is no reason why equity should not interfere and cancel the instrument, if it is in truth invalid, and the plaintiff is otherwise without remedy.

No actual fraud, in fact, is averred in the complaint, but the defendant is presumed to have known the extent of the powers of the commissioners, and their duty with respect to the property of the city of New York, in connection with the sinking fund, and the application by them of the rents and profits to the payment of the city stocks and the interest thereon.

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I think the action is properly brought in the name of the municipal corporation, "in their own behalf and in behalf of all and singular the inhabitants and tax-payers of, and in the said city, and in behalf of all and singular the holders of the public stocks of the city."

The contract which was the foundation for the lease was, in fact, made by the commissioners of the sinking fund. It is not like the case of a private person suing to avoid the consequences of his individual acts, or to have canceled an instrument made by himself individually.

I am of opinion that the municipal corporation stands in such relation to the property in question that it may properly ask a court of equity to examine into the validity of conveyances made by its officers, or persons upon whom duties are cast by law with respect to it, and seek to have instruments and deeds which convey away property to the injury of the tax-payers and creditors, and which are void or voidable, canceled and delivered up, so that the property may be applied to the purposes to which it has by law been pledged (*N. Y. and N. H. R. R. agt. Schuyler, supra*).

I would have preferred to have suspended a decision upon the questions involved in the defendant's motion until the facts presented by the defendant's answer on the merits were before me, and have then disposed of the whole case.

Evidence may yet be offered on the trial which may modify these conclusions and present the whole case in a different light.

But as the counsel for the defendant urged that his motion to dismiss the complaint, made at the opening, should be fully considered and decided before further proceeding with the trial, and, as such course was acquiesced in by the plaintiff's counsel, I have been compelled to examine the complaint, and, after giving the best consideration I was able to the objections urged, and the carefully prepared arguments of the counsel, I have come to the conclusion above indicated, that the defendant's motion must be denied.

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The action was afterwards tried upon *the merits* at a special term of this court, whereupon the following opinion was delivered :

VAN VORST, J. — The substantial relief sought in this action is, that a lease to the defendant of certain ferries and their appurtenances be canceled, and that the possession of the ferries be restored to the plaintiff.

The question as to whether the action can be maintained has been heretofore considered at special term upon the motion to dismiss the complaint, when the subject was elaborately argued by the learned counsel now engaged, and the result reached, in substance, was that, upon the allegations contained in the complaint, the action was well brought by the plaintiff, and that, upon its undisputed averments, the plaintiff was entitled to the equitable relief which the complaint invoked.

The sufficiency of the complaint and the plaintiff's rights therefrom was then only considered.

Since then the action has been tried upon the merits, and the fundamental matters disclosed by the complaint, extrinsic to the lease under consideration, have been established by the evidence.

It has been proven that, at the time of the execution of the lease in question, there existed ordinances of the city corporation, approved by the legislature of the state, which created, established and guarded a sinking fund for the redemption of the city debt, which debt amounted at the time of the making of the lease to \$40,000,000 and upward.

That the rents of all city property, not being quit rents or market rents, were, by the city ordinances, pledged to the sinking fund for the payment of the interest accruing and to accrue upon the stocks of the city of New York, until the same should be finally and fully redeemed.

And it was made the duty of the commissioners of the sinking fund to collect, receive and apply such rents to that part of the sinking fund to which they were so pledged.

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That for several years preceding the commencement of the term under the lease, the subject of this action, the defendant held and occupied the ferries under a former lease for a term of ten years, at an annual rent of \$103 000, which had been regularly paid into the city revenues.

That the ferriage received by the defendant under such former lease had enabled it to pay a dividend of ten per cent per annum to its stockholders upon a capital stock of \$1,000,000, after discharging the rent.

That during the term of the present lease, which commenced on the 1st day of May, 1871, the receipts from the ferries received by the defendant have steadily increased over and above what they were during the previous term, and amount to nearly \$1,000,000 per annum, enabling the defendant, not only to continue to pay its dividend of ten per cent per annum to its stockholders, but to carry over annually a surplus of earnings to a reserve fund.

The evidence shows satisfactorily that the rental value of the lease for the term under consideration is greater than that of the previous term, when the rent reserved was \$103,000 per annum; and it also establishes the fact that the commissioners of the sinking fund have granted a lease of these ferries, which were of a greater rental value than the previous term, for a further term of ten years at a nominal rent of one dollar per annum. This I cannot consider they had any power legally to do.

I had occasion to say, on deciding the motion to dismiss the complaint, that the commissioners of the sinking fund were under a positive duty to the city of New York, its tax-paying inhabitants and creditors, to obtain the rental value of these ferries for the use of the sinking fund to which it was pledged.

The concession in the way of a reduction of fares to persons using these ferries during certain hours of the day cannot justify their action or uphold the lease, which is a direct impairment of the sinking fund and a diminution of its

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resources. The commissioners had no right to give away to a private corporation, and for the benefit of its stockholders, the rent which was fairly demandable, and which, it appears, it was not unwilling to pay, upon the condition that persons crossing the ferry between the hours of five and half-past seven o'clock in the morning and afternoon of each day should be allowed to do so at a lower rate than those who should cross during other hours of the day.

This concession can in no just sense be regarded as an equivalent for the rent withdrawn from the sinking fund.

It could not be withdrawn for any such purpose, nor upon any such pretense. And, in addition, the result shows that such concession has not reduced the rental value of the ferries, as the receipts by the defendant are greater since the concession than before.

The pledge of these rents to the sinking fund is a trust which should be faithfully observed and sedulously guarded; and the obligations resting upon public officers, upon whom duties are cast with regard to the funds of the city, should not be relaxed.

Judicial approval cannot well be invoked in favor of this transaction, nor should the making of a lease of property of so large a rental value for a nominal consideration of one dollar per annum by the commissioners of the sinking fund become, by the sanction of the court, a precedent.

The legitimate outcome of an approval of this lease would favor breaches of official duty, and would in the end defeat the creation of the fund to discharge the city debt, which good faith with creditors and the law itself demands.

I do not deem it necessary to reassert what was before said by me with respect to the performance of duty by persons designated by statute to hold official relations to a municipal corporation. I adhere to the views heretofore expressed. These duties must be well performed.

I cannot accept the proposition that the city stocks sought to be secured by the sinking fund were only those which

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existed at the time of the adoption of the city ordinances of 1844 or the revision in 1859 (*Ordinances of the city, chap. 9, revision of 1859, art. 1, sec. 1; art. 2, sec. 2; art. 3, secs. 3, 14, 18; art. 4, sec. 28; chap. 225 of Laws of 1845; chap. 137 of Laws of 1870*).

I conclude the ordinances to be prospective as well as retrospective in their operation. Section 18, article 3, declares that the terms "city debt" and "city stock" shall be construed to mean any stock or fund created by the corporation of the city of New York.

The evidence shows that on the 31st day of December, 1870, six months after the date of the lease, but several months before the commencement of the new term, the funded debt of the city was \$48,000,000. We are not in reason to assume that this great debt was created within six months after the date of the lease, or that it has since and before the commencement of this action been paid off and discharged. The reasonable presumption is the other way, and that the funded debt was in existence when the lease was made, and is still outstanding.

There was enough in the evidence, however, to call upon the defendant to establish the contrary if it could be proved.

The debt of \$48,000,000, under the evidence, was the funded city debt, and is not presumably made up of temporary debts and loans authorized by the following acts: Chapter 697, section 8, Laws of 1867; chapter 564, section 4, Laws of 1865; chapter 565, sections 7 and 9, Laws of 1865; chapter 367, section 7, Laws of 1866.

The Laws of 1865 and 1866, above referred to, authorized no increase of the funded debt. They provided for temporary necessities in anticipation of the collection of assessments. The act of 1865 had relation to the stocks of the county, not of the city of New York. The indebtedness authorized by the act of 1867 was temporary, to be repaid by assessments collected or taxation.

The complaint alleges that under the previous lease and up

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to the 1st of May, 1871, the defendant paid the annual rent of \$103,000 to the proper officers of the city, who were required by law to collect the same for the use of the commissioners of the sinking fund, and this allegation of the complaint I understand the answer to admit. This I regard as a concession that the rents properly and legally went to the commissioners of the sinking fund, with which commissioners all negotiations for the present lease were had by the defendant, and by whom the lease was in fact made.

The fact that so much land in Brooklyn included in the former lease, which had been taken for the bridge tower and works, is not included in the present lease, does not meet the objection that the act of the commissioners in leasing property of great rental value at a nominal rent was *ultra vires*.

The defendant, with knowledge that the plaintiff's land, necessary for the bridge towers, was to be excluded from the future lease, placed a rental value upon the ferry franchises proposed to be granted by expressing its readiness to take the same at the former rent. That could not be legally given away for a supposed equivalent in a limited right to use the ferries by persons during certain hours of the day. The loss fell upon the sinking fund exclusively, and could not be effected under the provisions of chapter 163, Laws of 1862, section 3.

Besides, it was in no sense an equivalent.

There is a covenant in the lease that the defendant should pay such annual taxes as shall or may be imposed upon such parts of the demised premises as are situated in Brooklyn. What property was then subject to taxes, excluding that taken for the bridge towers, does not appear. There is no evidence of any amount of taxes paid or liable to be paid. Whatever they were, their payment does not aid the sinking fund.

It is not considered that this covenant is of any such moment or importance as to place the defendant under any burden to be taken into account in determining this controversy.

The present lease, as well as the former one, contained

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covenants that new buildings should be erected at the expense of the defendant. No evidence has been given of any erections.

But both leases contain an agreement on the part of the plaintiff to pay at the end of the term all necessary expenses incurred in the erection of new buildings. While there might be an obvious propriety in such covenant to pay for all buildings and improvements under the former lease, by the terms of which there would be received in the city treasury in the way of rent over \$1,000,000, there is an apparent want of reciprocity and justice in the conditions in the new lease, by which the lessor is obliged at the end of a term, during which it has received only the sum of ten dollars in all as rent, to purchase from the lessee at an appraised valuation the boats, buildings and other properties, from the use of which, under the ferry franchise, the defendant has received, for the advantage of its stockholders, many millions of dollars. From what source the means are to be gathered to make the repurchase the lease does not disclose.

But the provisions of the lease amount to this: The ferry franchises, under a nominal rent, are given to a private business corporation, who, through their use, by means of vessels and other property, receive, as gains upon their capital invested in the vessels and other property, many millions of dollars, and in the end receive back from the lessor in money the value of the property so invested.

The fact that during a period of many years conveyances have been made by the municipal corporation to charitable and benevolent institutions for nominal considerations is alluded to by the counsel for the defendant as an argument in favor of its power to control and dispose of its property in this manner. The legality of those conveyances cannot here be considered or passed upon.

Analogies of this character can add nothing to the true elucidation of the transaction we are now considering, which involves the legality of a lease to a business corporation for a

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nominal consideration. They cannot be logically cited to sustain the lease, and shed no true light upon the powers of the commissioners of the sinking fund, having well defined and important relations to the property of the city, and subject to the obligations and duties growing out of such relations, which must be faithfully observed.

The lease in question has not been validated, as is urged by the defendant's counsel, by any of the several acts of the legislature to which reference is made. The legality of the lease has not been passed upon by these acts. There is nothing in the acts in question which shows that the legislature had any such object in view, or that the design of the acts was to accomplish such result.

After a consideration of the arguments and brief of the learned counsel for the defendant, I cannot conclude that the lease can be upheld upon authority; but contrariwise I think reason, justice and law is against its validity, and I conclude that there must be judgment for the plaintiff, as demanded in the complaint.

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SUPREME COURT.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF
NEW YORK agt. THE NORTH SHORE STATEN ISLAND FERRY
COMPANY and another.

*Clouds upon title — Piers — Bulk-heads — action to set aside lease thereof —
Pleadings.*

An action in equity may be maintained by the mayor, aldermen and commonalty of the city of New York to set aside, as a *cloud upon title*, a lease of piers, bulk-heads and rights of wharfage made by the *department of docks* when the same was not made at public auction and to the highest bidder.

Piers and bulk-heads and wharves cannot be granted to the exclusive use of individuals or private corporations.

As the lease of piers and bulk-heads did not confer upon the lessee exclusive right to their possession, *held*, that an action of ejectment would not lie. Such action cannot be maintained for an *incorporeal hereditament* (*Mayor, &c., of New York agt. Brooklyn Ferry Company, ante, page 186*).

Special Term, May, 1876.

THE plaintiff seeks to recover certain lands under water in defendant's possession under a lease from the *department of docks*. The lease is sought to be removed as a *cloud upon their title*. The defendant demurs to the complaint as not stating a cause of action.

James McNamee, for plaintiff.

Luther R. Marsh, for defendant.

VAN VORST, J. — The lease in question is not void upon its face. The facts, which it is claimed by plaintiff's counsel

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render it void, are extrinsic to the lease, such as the failure of the dock department to lease the property at public auction to the highest bidder. The omission of this act and others, which it is alleged make the lease invalid, would have to be established by proof on the trial.

In the absence of such proof the public authorities would be presumed to have acted in a legal manner.

To rebut this presumption the contrary must be shown. In such case if the lease be a cloud upon the title the remedy in equity is proper.

The deed, by its terms, purports to lease the pier and bulk-heads, but it does not grant exclusive possession. The piers and bulk-heads must be devoted to public use, and cannot be granted exclusively to individuals or private corporations (*Taylor agt. Beebe*, 3 *Robt.*, 262; *Board of Comrs. of Pilots agt. Erie Railway Co.*, 5 *id.*, 381; *Radway v. Briggs*, 37 *N. Y.*, 256; *Comrs. of Pilots agt. Clarke*, 33 *id.*, 251).

In the last case cited it was held that a lease of a public wharf does not confer upon the lessee the exclusive right to its possession, use or control.

By force of the lease the lessee only becomes entitled to the wharfage accruing thereout. The wharf continues a public place.

The pier cannot be so incumbered by the lessee with structures as to interfere with its use by the general public.

The lease in question, it is true, affects real property, but it conveys only an incorporeal hereditament appurtenant to the realty. That is a cloud upon the realty. There is no remedy by ejectment.

It cannot be truly said that the defendant has exclusive possession of real estate and withholds the same. Ejectment cannot be maintained for an incorporeal hereditament (*Rowan agt. Kelsey*, 18 *Barb.*, 488).

The demurrer should be overruled with liberty to the defendant to answer on payment of costs.

(*Affirmed*, 9 *Hun.*, 620.)

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N. Y. COMMON PLEAS.

CHRISTIAN WYEN agt. JOHN SCHAPPERT.

Promissory note — notice of protest — when may be served by mail — what is good service by mail — who deemed holder for purpose of receiving and giving notice of protest — what is not unnecessary and unreasonable delay.

When the indorser of note lives in a different place from that in which presentment or demand is to be made, personal service of notice of protest is not required, but the notice may be served on him by mail, although he lives in the same place with the holder who serves the notice.

Delivery to a city letter carrier of a notice of protest inclosed in an envelope, properly addressed and with postage prepaid, is good service by mail.

Where a note held in New York was payable in Kutztown, Pennsylvania, and the holder placed it in a New York bank for collection, which sent it to its Pennsylvania correspondent, a bank at Allentown, within eighteen miles of Kutztown, whence it was sent to a bank at Philadelphia, and thence to a bank at Reading, and thence to Kutztown for presentment, where it was dishonored:

Held, that each agent for transmission of the note for collection, having indorsed it, was the holder for the purpose of receiving and giving notice of protest; and that the return of such notices by the same channel, each bank forwarding them by the next mail, was not an unnecessary and unreasonable delay which discharged the first indorser.

General Term, January, 1878.

APPEAL from judgment on verdict directed by court for the plaintiff against the defendant, as indorser of note for \$10,000.

Douglas Campbell, for respondent.

Martin L. Townsend, for appellant.

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DALY, C. J.—Where the indorser resides in a different place from that in which presentment or demand of the note is to be made, personal service of the notice of the dishonor of the note is not required, but notice may be served by mail (*Ransom agt. Mack, 2 Hill, 590*). Such was the case here. The notice was served by giving it to a United States letter carrier in this city, this city being the place where the indorser resides. This was a service by mail. It is provided by the laws of the United States (*U. S. Rev. Stat., p. 759, sec. 3980*) that every route agent, postal clerk or other carrier of the mail shall receive any mail matter presented to him and properly prepaid by postage stamps and deliver the same for mailing at the next post-office at which he arrives; and it is further provided that letter carriers shall be employed for the free delivery of mail matter in every place containing a population of 50,000 inhabitants (*sec. 3865*). It is claimed that a letter carrier, under this section, is not embraced by the term used in the other section "route agent, postal clerk or other carrier of the mail." The letter carriers are to be employed, by the express terms of the three thousand eight hundred and sixty-fifth section, for the free delivery of mail matter; and if a letter carrier is, under this section, to carry mail matter he is clearly embraced, by the words in the preceding section, "or other carrier of the mail." The word "mail," which with some changes in the orthography is found in many languages, means, in its original signification, a wallet, sack, budget, trunk or bag; and in connection with the post-office means the carriage of letters, whether applied to the bag into which they are put, the coach or vehicle by means of which they are transported, or any other means employed for their carriage and delivery by public authority. It came originally into use as referring to the valise which postillions or couriers had behind them and in which they carried letters at an early period when that was the mode in which letters were carried and delivered. And after the establishment of post-offices, post-routes and post-coaches it became, as it is now, a general

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word to express the carriage and delivery of letters by public authority. The carrier in this case carried a bag having two compartments, in one of which letters to be delivered were put and in the other letters to be sent by mail, the kind of bag such officials were accustomed to carry, and the delivery to such a carrier of the notice of protest inclosed in an envelope properly addressed to the defendant with the postage prepaid was a service of the notice by mail. The remaining question is, whether there was due diligence in mailing the notice of protest to the defendant. The note was made payable at the Peabody Bank, Kutztown, Pennsylvania. The plaintiff placed it in the German Exchange Bank, in this city, for collection and they forwarded it to the Second National Bank of Allentown, Pennsylvania, which latter bank forwarded it to the National Bank of the Republic, in Philadelphia, Pennsylvania, by which bank it was forwarded to the Farmers' National Bank of Reading, Pennsylvania, and the latter bank forwarded it to the National Bank of Kutztown, Pennsylvania, being indorsed first by the cashier of the German Exchange Bank and by the cashiers of each of the banks through which it was successively transmitted to Kutztown for collection. It was presented by the National Bank of Kutztown to the Peabody Bank, at that place, where it was made payable and payment demanded which was refused, the answer being "no funds." It was then regularly protested by the notary of the bank and notices of protest were sent back in the same order in which the note had been transmitted, being regularly sent from bank to bank on the day of its receipt, or by the next mail, until it reached the German Exchange Bank, the clerk of which inclosed the notices of protest to the indorsers, to the plaintiff, by mail, who, as soon as he received the letter containing them, went to the indorser's (the defendant Schappert's) house to deliver the notice to him and discovered that he had moved, but could not learn where, and the plaintiff then went to Schappert's last place of business. Schappert had closed up his business on the fifteenth of July preceding, but the plain-

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tiff learned that he was in the habit of stopping there to receive his letters every morning. The plaintiff then went to the German Exchange Bank upon the afternoon of the day he received the notice, or the next morning, but as he said to the best of his knowledge he believed it was the same afternoon and left directions to send the notice to the defendant's last place of business, and the notice was then immediately placed in an envelope, properly directed, the postage paid and was delivered in time for the next mail to the United States letter carrier who was in the habit of coming to the German Exchange Bank, which was on his route, to deliver and receive letters. The carrier had no recollection in respect to this particular letter, but testified that all letters so received by him were deposited by him at the United States station where he received letters to carry and where he deposited those that were sent by mail. The note was presented and protested on the 4th of September, 1876, and what time elapsed before the notices of protest were received by the German Exchange Bank in this city does not distinctly appear, but it was some time between four and seven days from the day the note was payable, and certainly within a week. The German Exchange Bank when they received the note for collection having no correspondent at Kutztown, nor any person there to whom they could send it, sent it, as they generally did with all their collections in Pennsylvania, to the bank at Allentown. As the discount clerk expressed it, they did so in accordance with their "usual custom of collection." Why the Bank of Allentown sent the note to the Bank of Philadelphia, that being a circuitous route to Kutztown, which was but eighteen miles from Allentown and which involved the transmission of the note through two additional banks, does not appear, but probably for the same reason as the German Exchange Bank, because they had no correspondent then at Kutztown, nor any person there to whom they could send it. The appellant claims that this was unnecessary and unreasonable, as it delayed the service of notices of protest on the defendant, in consequence of the transmission of the notices consecutively

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to each preceding indorser, involving an incidental delay in the case of each indorser; but the presentation for payment, and the transmission of the proceeds of a note for the large amount of \$10,000, was a very important business matter, and the Bank of Allentown would naturally send it to their own correspondent, a bank in which they could confide; and as nothing appears in the case but the fact that they sent it to the National Bank of the Republic at Philadelphia, I do not see that we must infer, in respect to a note of that large amount, that that was not proper because it was not the most direct route. Security and safety in the collection of so large an amount of money may, for all we know, have made it, as a matter of business experience and judgment, the most judicious course to send it to the bank at Philadelphia for collection at Kutztown. We cannot say judicially the bank at Allentown was bound to send it directly to Kutztown because it was only eighteen miles distant, and there was daily communication with it by mail and by railroad, whether the bank had any correspondent there or knew anyone there or not. Such matters are generally regulated by business connections; and if a note in its transmission from one place to another for collection is sent through a chain of banking institutions, it is probably because each one in the link is acquainted with the financial character of the other, and that the chain of connection is one of reciprocal credit and confidence. In a commercial matter like this, it is better for judicial tribunals to infer that banking institutions know what is the best way of conducting such a business, unless the court has facts before it from which it can see that the course pursued was clearly an improper one. The note having been transmitted through these several banks, the return of the notices of protest to the next immediate indorser, and so on through each preceding indorser, was right. It is claimed by the defendant that each of the banks through which the note passed for collection was the agent of the holder, and that he is responsible for a delay in the delivery of the notices of protest, arising from the fact of the unnecessary interposition of so many agents.

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Where a note, as in this case, is indorsed to a bank for collection at a distant place, that bank and the banks to which it is successively indorsed in the course of its transmission to the place where it is payable are, as respects the giving and receiving of notices of protest, regarded as the real holders of the note, so that when the note is dishonored, the proper course for the bank that presents it is to send the notices of protest to the next immediate indorser from whom they received the note, and for each indorser to do the same, although it may be a more circuitous route and involve more delay than to send notices from the place of presentation to each indorser (*Mead agt. Engs*, 5 *Cow.*, 303; *Ogden agt. Dobbin*, 2 *Hall*, 167; *Farmers' Bank of Bridgeport agt. Vail*, 21 *N. Y.*, 485; *Howard agt. Ives*, 1 *Hill*, 263; *Bank of the United States agt. Davis*, 2 *id.*, 457; *Colt agt. Noble*, 5 *Mass.*, 157; *Clade agt. Bayley*, 12 *Mees. & W.*, 51; *Scott agt. Lifford*, 9 *East*, 347). The appellant refers us to *In re Leeds Banking Company* (*Eng. Law Rep.*, 1 *Eq. C.*, 1) for the proposition that the respective banks through which a note was transmitted were the agents of the plaintiff, and that he is responsible for the delay resulting from the employment of four different agents to collect it. All, however, that was held in that case is, that where a bill, the drawer and acceptor of which had become bankrupts before the bill became due, was indorsed by a bank in Leeds to its correspondent in Liverpool, with the words payable in need at a bank in London, that the bank in London was by such an indorsement constituted an agent for the payment only, and not an agent for notice of dishonor generally; and that the notice of protest should have been sent to the indorser in Liverpool, and not, as it was, to the bank in London. There is nothing, therefore, in this decision in conflict with the rule as I have stated it; and if it were, it would be controlled by the authorities cited, by which the law in this state is well settled, as it is also in this country and in England. The notices of protest, therefore, in this case were sent in the proper way. Each of the banks through which they passed would, in a

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case like this, have exercised due diligence by sending notice the day following the one on which they received notice (*The Farmers' Bank of Bridgeport agt. Vail*, 21 N. Y., 488), and the evidence is that each of them sent the notices within this time — in fact, by the next mail. Full effect is undoubtedly to be given to the rule, which had its origin in commercial usage, and was dictated by commercial necessity, that prompt and immediate notice should be given to an indorser of the dishonor of a bill; that in every case due diligence should be shown. But in applying such a rule at the present day, and determining, upon a given state of facts, whether due diligence has been exercised, it is to be considered that the ordinary mode of collecting a note, where it is payable in a different place from the holder's residence, is to deposit it for collection in a bank at the place where the holder lives, that it may be collected for him in a distant part of the country where the note is payable; banking institutions having particular facilities for that purpose, it being their custom to perform such a service gratuitously for the accommodation of their depositors or customers, and there being a greater security for a safe transmission of the money through their instrumentality to the holder than would be the case if he undertook to collect the note or bill himself. In performing such a service, they necessarily do so through the instrumentality of other banking institutions with whom they have established business connections, and who mutually co-operate and act for each other in forwarding the paper and seeing that it is duly presented at the time it is payable; and where there is, as in this case, nothing to question the good faith of the several banking institutions through whose hands this note passed in its transmission to Kutztown, that payment might be demanded, we are not to conclude because the note was not transmitted by the most direct route by mail or railroad, but by a circuitous one, that it was improper to do so, and unreasonably caused delay.

The judgment, therefore, in my opinion, should be affirmed.

VAN HOESEN and LARREMORE, JJ., concurred.

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COURT OF APPEALS.

JAMES McALPIN, administrator, &c., agt. REBECCA B.
POWELL.

Negligence — in action for personal injury occasioned by negligence or want of care of another, what must be made to appear.

To maintain an action for personal injury occasioned by the negligence or want of care of another, it must be made to appear that the defendant owed some duty or obligation to the party injured which he failed to discharge or perform. Unless there is some contract, duty or services which a party is bound to fulfill, there can be no negligence, fault or breach of the obligation.

The deceased was a bright, intelligent boy, nearly ten years of age, living with his father, who, with his family, occupied the upper story of defendant's tenement-house, and used the room, the window of which opened on the fire-escape, for working at his trade as a shoemaker. The boy, immediately previous to the accident, sat on the window-sill, the window being open, and being about fifteen inches from the floor, and about the same distance from platform of fire-escape. The deceased stepped on the platform of the fire-escape (the dimension of which was about eight by three and a half feet, and which had an iron railing around its outside), and passed to the end, where there was a trap-door and a ladder leading to the platform in the next story below. The hinges of the trap-door, which were rusted and only fastened with a small wire and a string, gave way, and he was precipitated below and killed:

Held, that the deceased had no right to go upon the platform, and was there for no legitimate purpose. It was not intended for any such use, and the act of the deceased in entering upon and passing along the platform was in violation of the purpose for which it was designed:

Held, further, that under such a state of facts, and where a person thus voluntarily exposes himself to danger and is injured, there is no rule of law which authorizes a recovery.

The distinction between cases where an infant is injured while lawfully in the highway, which it has the right to travel and use, and where he

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is palpably invading the premises of another, and is a mere trespasser at the time of the injury, pointed out and commented upon.

The owner of a building rented to a tenant without a covenant that the landlord should keep the same in repair, is not responsible for damages occasioned by neglect to repair.

Whether there was negligence of the tenant in not protecting the window with temporary grate or bars which exempted the defendant from liability, *quære*.

January, 1878.

APPEAL by defendant from a judgment for \$1,186, entered March 22, 1876, upon the verdict of a jury, and from an order denying a motion for a new trial.

The defendant was the owner of No. 97 Myrtle avenue, in the city of Brooklyn. On June 1, 1875, the plaintiff became her tenant of rooms on the third floor of the building. The deceased was the plaintiff's son. The third floor, in the rear, consisted of two rooms, one a small hall room, the window of which opened upon a fire-escape.

The fire-escape was about six feet long, by three feet six inches wide, protected by a railing about three feet four inches high. At one end was a trap-door which gave access to the ladder below. This trap was so arranged as to turn upwards on hinges, so that to open it, it was necessary that the person should stand some distance back on the solid part of the floor. The floor was made of open slats.

The deceased was in his tenth year. The father was a shoemaker, and he used the room which opened on the fire-escape for his bench, sitting there with a workman by the name of Donovan.

On the afternoon of August tenth the deceased was sitting on the window-sill with his feet resting on the floor or platform of the fire-escape. The window-sill was about fifteen or sixteen inches from the floor of the room, and the platform of the fire-escape fifteen or sixteen inches below the window sill. Donovan was engaged at his work. He heard a scream, looked out of the window and found that the boy had fallen

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through the door in the platform. To reach it he must have stepped upon the platform and then walked to the end in which the door was and stood upon the door. The boy fell to the ground and was killed.

It appeared that the hinges of the fire-escape were out of order, and that they were tied up by string and a piece of wire in a way which could be readily seen by anybody looking through the window. The plaintiff, as he sat at his work, looked right upon the fire-escape. He used the sill of the window to dry his shoes when in ink. This happened three or four times a week. He testified that it had never occurred to him to look at the trap-door; that if he had done so, he would have noticed its insecure condition.

The defendant and those who acted for her were not aware of the insecure condition of the fire-escape. When the plaintiff became tenant he did not call attention to it.

The case went to the jury upon the proposition of law, questioned by the defendant, both by exception to a refusal to nonsuit and by exceptions to the charge that the defendant was required to keep the fire-escape in repair and was responsible for neglect to do so.

The jury found \$1,000 for the plaintiff, and the defendant appeals.

John E. Parsons, for defendant, appellant. The premises were hired in the condition in which they were, and in the absence of any agreement to repair on the part of the landlord, the law assumes that the rent was fixed with reference to the condition of the premises, and required the lessee, if he wished repairs made, to make them at his own expense (*Doupe agt. Genin*, 45 N. Y., 119; *Witty agt. Mathers*, 52 *id.*, 512; *Suydam agt. Jackson*, 54 *id.*, 450; *Post agt. Vetter*, 2 E. D. Smith, 248; *Jaffe agt. Harteau*, 56 N. Y., 398; *Corey agt. Mann*, 14 How. Pr., 163; *Gott agt. Gandy*, 2 Ellis & B., 847). The act (*Laws of 1873*, p. 134) providing for the construction of fire-escapes was merely a police regulation creating an obli-

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gation only upon a landlord to the public authorities. For a failure to comply with the statute landlords are responsible to the penalties therein prescribed, but the statute does not operate to vary a contract which has been made between lessor and lessee. In this case the hiring or lease of the plaintiff in effect provided that the defendant should not be compelled to repair the premises. For the benefit of such an agreement the defendant paid a valuable consideration in the diminished amount at which the law presumes the rent to have been fixed. It cannot be maintained that notwithstanding the statute, it was not in the power of the parties to agree that as between them the defendant should not be called upon to make repairs. This was the agreement that was made, and to attach any such liability as was charged by judge NEILSON is to create for the parties a contract different to that into which, for sufficient consideration, they have entered (*The Mayor of the City of New York* agt. *Corlies*, 2 *Sandf.*, 301; *Howard* agt. *Doolittle*, 3 *Duer*, 464; *Sherwood* agt. *Seaman*, 2 *Bos.*, 127). The premises were private premises. The cases, therefore, which charge an owner for liability with reference to the condition of a street (*Congreve* agt. *Smith*, 18 *N. Y.*, 79; *Davenport* agt. *Ruckman*, 27 *id.*, 568; *Dygert* agt. *Schenck*, 23 *Wend.*, 446; *Anderson* agt. *Dickie*, 1 *Robt.*, 238) or of a pier (*Swords* agt. *Edgar*, 59 *N. Y.*, 27; *Cannavan* agt. *Conklin*, 1 *Daly*, 509) do not apply. When an owner derives benefit from a public use, the law very properly imposes upon him the necessity to keep the premises in suitable condition for public use. Here the premises in question were just as absolutely the property of the plaintiff during his hiring as if he were the owner. The defendant did not even have the right to enter the premises for the purpose of making repairs or for the purpose of ascertaining whether there was a necessity to make them. The responsibility for the premises as between the defendant and the plaintiff devolved upon the latter (*O'Brien* agt. *Caswell*, 59 *N. Y.*, 497; *Kastor* agt. *Newhouse*, 4 *E. D. Smith*, 20; *Howard* agt. *Doolittle*, 3 *Duer*, 464).

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The judge erred in his charge to the effect that the deceased was only bound to exercise the care which was proper to his age. The public streets are for the use of all ages, children as well as adults, and the law requires, therefore, that they shall be kept in a condition suitable for all ages. Where, from any defect, a child is injured, the law properly holds the child only to the exercise of such care as corresponds with his age (*Davenport agt. Ruckman*, 37 *N. Y.*, 658; *Sheridan agt. Brooklyn and Newtown Railroad*, 36 *id.*, 39; *O'Mara agt. Hudson River Railroad*, 38 *id.*, 445; *Morgan agt. Brooklyn Railroad*, 38 *id.*, 455; *Thurbur agt. Harlem B. M. and F. R. R. Co.*, 60 *id.*, 326). But no such rule applies in the case of an apparatus like the fire-escape, not arranged for general use. Furthermore, a fire-escape is only designed for use in case of fire. It is a dangerous construction from its very nature, unsuitable to be used by a child; impracticable to be used by a child on the only occasion (in case of fire), when it is designed to be used at all. It was not intended as a place for children to play; and being used for that purpose at the time in question, any responsibility properly devolved upon the deceased, and upon the plaintiff (*Calligan agt. The N. Y. C. and H. R. R. Co.*, 56 *N. Y.*, 651; *Carroll agt. Staten Island R. R. Co.*, 58 *id.*, 126).

Morris & Pearsall, for plaintiff, respondent. The tenants in the house had a right to suppose that the balcony was strong and secure in all its parts, because the use to which it would surely be put, in case of fire, would subject it to great pressure. It was the legal duty of the defendant to keep the balcony in a safe condition, so that persons going on any part of it would be free from danger. "A legal duty is that which the law requires to be done or forborne." The performance of this legal duty on the part of the defendant, to keep the fire-escape in "good repair," is not excused by reason of her ignorance that it was out of repair. If that was the case, the greater the "neglect or default" of the defendant the

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greater would be her immunity. This balcony was in a dangerous condition at the time the premises were rented to the plaintiff. The balcony being so situated that persons would naturally go upon it, it was the duty of the defendant or her agent (irrespective of the duty the law imposed upon her) to have notified the tenant of its dangerous condition. This duty was wholly neglected. The only question entitled to a moment's consideration is, whether the plaintiff's intestate was guilty of contributory negligence in going upon the balcony. This question was submitted to the jury by the court under a very clear charge, more favorable to the defendant than she had a right to claim; and the finding of the jury upon that question is conclusive. "The natural instinct of self-preservation ordinarily will lead to the employment of the precaution which the situation suggests to an individual in danger of harm" (*Weber* agt. *N. Y. R. R. Co.*, 5 *N. Y.*, 451). "The known disposition of men to avoid danger is to be considered in determining the question of contributory negligence" (*Johnson* agt. *Hudson R. R. Co.*, 20 *N. Y.*, 65). "Love of life and the instincts of self-preservation being of the highest motive for care, they will stand for proof of it till the contrary appears" (*C. and P. R. Co.* agt. *Brown*, 66 *Penn. St.*, 396). The question of contributory negligence was properly submitted to the jury, and their verdict cannot be disturbed (*Ireland* agt. *Oswego Railroad Co.*, 13 *N. Y.*, 533; *Bernhardt* agt. *R. S. R. Co.* 23 *How.*, 178; *Mul-laney* agt. *Spence*, 15 *Abb.*, 330).

MILLER, J. — The owner of the premises where the accident happened which caused the death of the intestate was under a legal obligation to provide a fire-escape for the benefit of the occupants, and to keep the same in good repair (*S. L. of 1873*, chap. 863, sec. 36, p. 1354). While a failure to comply with the statutes rendered the owner liable for the penalty prescribed, in the absence of any express agreement to that effect, certainly it is by no means clear that this statutory duty could

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be imposed upon the tenant. It is true that ordinarily, unless there is an agreement to repair on the part of the landlord, premises are hired in the condition in which they are at the time of the demise, and the rent is supposed to be arranged with reference to such condition. In such cases the landlord is under no obligations to repair, and the lessee, if he wishes any repairs, must make them at his own expense (*Witty agt. Matthews*, 52 *N. Y.*, 512). The reparation of a fire-escape would scarcely seem to come within the range of ordinary repairs of a building. It is an attachment to a certain class of tenant-houses which are enumerated in the statute, which is erected especially for the protection of the occupants, and a duty is imposed upon the landlord and owner having in view that object. Even if such a duty might be imposed by another under an express agreement, it is not apparent that it could be considered as constituting a part of the obligations of a tenant who hired without any special agreement as to repairs. It would be extremely difficult to define the limits of such a duty, unless it devolved upon the owner in a tenement-house occupied by a number of persons. If one or more who demised one story should be required to take care of the portion there and the others the remainder, it would be embarrassing to arrange for the whole so as to insure safety and protection to all the occupants. The law cited clearly was not intended thus to divide among several the performance of the obligation imposed. It was aimed at the owners. They were to erect and keep in repair, and the penalties provided could not well be inflicted upon a party not named in the act. Such being the purpose and design of the law, at least in the absence of any special agreement to the contrary, it must be assumed that the defendant was obligated to take care of and keep in repair the fire-escape where the accident occurred. Assuming that such obligation devolved upon the defendant the question arises whether he occupied such a relationship to the deceased as created a liability to respond in damages for the accident which caused his death. To maintain an action

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for personal injury occasioned by the negligence or want of care of another it must be made to appear that the defendant owed some duty or obligation to the party injured which he failed to discharge or perform. Unless there is some contract, duty or services which a party is bound to fulfill there can be no negligence, fault or breach of the obligation. The reported cases, where parties are charged for injuries to another occasioned by accident, have been decided upon the principle that there was negligence in doing, or omitting to do, some act by which a duty or obligation which the law imposed has been disregarded. The real point to be determined, then, is whether the defendant owed any duty to the deceased. If he was a trespasser when he entered upon the fire-escape he occupied the position of one who comes upon the premises of another without right, and who can maintain no action if he is injured by an obstruction or falls into an excavation which has been left open and uncovered. Even a license is not a protection unless some inducement or enticement is held out by the owner or occupant, and no recovery can be had for injuries sustained. The deceased was a bright, intelligent boy, nearly ten years of age, living with his father, who, with his family, occupied the upper story of the defendant's tenement-house, and used the room, the window of which opened on the fire-escape, for working at his trade as a shoemaker. The boy, immediately previous to the accident, sat on the window-sill which was fifteen or sixteen inches from the floor, the window being open, and about the same distance from the platform of the fire-escape. A workman engaged at his work was in the room at the time, but did not notice what took place. The deceased must have stepped on the platform of the fire-escape, which was about eight feet in length and three and one-half wide, and had an iron railing around the outside portion of it. and then have passed to the end where there was a trap door and a ladder leading to the platform in the next story below. The hinges of the trap-door, which were rusted and only fast-

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ened with a small wire and a string, gave away and he was precipitated below and killed.

The deceased clearly had no right to go upon the platform, and was there for no legitimate purpose. It was not intended for any such use, and the act of the deceased in entering upon, and passing along, the platform was in violation of the purpose for which it was designed. It was put up only for a fire-escape to be used for the protection of life in case of danger from fires, and was not intended, and was never used, as a balcony. The proof showed that children were not accustomed to go there, and it was only accessible by passing out of the window. Nor does it appear from the evidence, although it was protected in part by an iron railing, that it was intended to be guarded in a manner sufficient to prevent accident to very young children arising from such an exposed position. It bore no indication that it was designed for general use, and furnished no invitation or attraction to young children any more than the roof of a stoop or piazza which projects under the window of a dwelling-house and is easy of access to persons in the vicinity. Under such a state of facts, and where a person thus voluntarily exposes himself to danger and is injured, there is no rule of law which authorizes a recovery. The books are full of cases bearing upon the subject, and although the decisions are not entirely harmonious there is no adjudication which holds that under circumstances like these an action will lie, while there are many in a contrary direction (*Lorgan agt. Champlain Canal Co.*, 56 *N. Y.*, 1; *Victory agt. Abbott, court of appeals*, 1876, *MS.*; *Abbott agt. Macfie*, 33 *L. J.*, 177; *Mangan agt. Atterton, L. R.*, 1 *Ex.*, 239).

In *Abbott agt. Macfie (supra)* the defendant placed the shutter of a window against the wall of a public street. The dress of a child who was playing in the street jumping off the shutter caught in the same and it fell and injured the child, and it was held that the defendant was not liable. The child was lawfully in the street in the case cited, and, hence, might

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very naturally be attracted to the shutter which was there, while in the case at bar the deceased was obliged to go beyond the room in which he was to reach the fire-escape and overcome obstacles in the way of getting there. The decision cited establishes a stronger case against the defendant than the case at bar. In *Mangan agt. Atterton (supra)* the defendant exposed a machine which was dangerous when in motion. A boy four years old, by the direction of his brother, seven years of age, placed his fingers within the machine, which were crushed, and it was held that the defendant was not liable. Although the rule in regard to liability for the negligence of children is not as stringent in England as in this state, yet, within the principle decided in the last two cases, it is difficult to see how a liability can be incurred where the defendant has done nothing to produce the injury, and where there is an unauthorized interference with, or invasion of, his rights. It is true that some of the decisions are seemingly in conflict with those referred to, and cases may be found where a different doctrine appears to be upheld, as in *Lynch agt. Nordin* (1 *Ad. & El. [N. S.]*, 29), where an infant entered into a cart standing in the street, and was injured, the owner was held liable. But there is a clear distinction between such a case, where the infant was lawfully in the highway which it has the right to travel and use, and where the blamable carelessness of the defendant tempted the child to amuse himself with an empty cart and a deserted horse, and a case where he is palpably invading the premises of another and is a mere trespasser. In the latter case a party is without the protection of the law, except in special cases.

The owner of land may dig an excavation on his own premises, not substantially adjoining a public highway, and no action lies against him by one who has strayed off the highway and fallen into the excavation (*Hardcastle agt. S. J. Railroad Co.*, 4 *Hurlst. & Nor.*, 67; *Hounsel agt. Smith*, 29 *L. J. C. P.*, 203; *Holt agt. Wilkes*, 3 *Barn. & Ald.*, 304; *Nicholson agt. Erie Railway Co.*, 41 *N. Y.*, 525). But a

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different rule prevails when the pit dug is so near the highway that a person, in using the same with ordinary caution, may fall in (*See Beck agt. Carter, court of appeals, February, 1877, where the authorities are reviewed*).

The reason of the rule in the latter case is, that a person lawfully using the highway in a reasonable manner is liable to fall in the pit, and where such is the case, a duty is imposed upon the owner to protect the excavation. The deceased was not on the platform by the defendant's invitation, nor did he come near there, as in the case of an excavation near the highway, while in the lawful use of his father's premises. He had stepped over the bounds and passed the limits to which he was restricted by the demise to his father, and, therefore, his case does not come within the rule which requires a party to protect a structure upon his own premises which is dangerous to others (*Gautrit agt. Egerton, L. R., 2 C. P., 371; Coe agt. Platt, 5 L. and Eq., 491; 11. id., 551; Lygo agt. Newbold, 24 id., 507; Stern agt. Jackson, 32 id., 349; Wilkinson agt. Farnie, 1 Hurlst. & Colt., 633*).

The deceased had not even a license or permission, express or implied, to pass upon the fire-escape; nor do we think that an inducement was held out which might have led him or others to believe that it was intended to be used by persons occupying the building; or that it can be claimed that the defendant, directly or by implication, invited him to enter, and thus assumed the obligation that it was in a safe condition, or owed him any duty. The learned counsel for the plaintiff insists that the owner of machinery or other property, which by being trifled with by children results in injury to them, is liable if he negligently leave it open upon his own land or premises where children by interfering therewith may be injured, and we are referred to some cases which are supposed to maintain this doctrine. A leading case in which this rule is upheld is that of *The Railroad Company agt. Stout* (17 Wall., 657). A child strayed on the company's grounds, and was injured by a turn-table being moved by other children, and it was held that while, as a general rule in

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regard to an adult, that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule to an infant of tender years.

That the care and caution required of a child is according to its maturity and capacity only, and this is to be determined in each case by the circumstances of that case; and that while the infant here was clearly a trespasser, and had no right on the premises of the railroad company, the defendant in the record disclaimed resting his case on the ground of plaintiff's negligence. The disclaimer ought to dispose of the question of plaintiff's negligence whether made in a direct form or indirectly under the allegation that the plaintiff was a trespasser upon the railroad premises, and cannot recover. The question, therefore, as to the negligence of the child was not in the case, and although the opinion discusses the authorities which bear upon that subject, an examination of them was not required for the decision of the same. This case is followed by *Keefe agt. Milwaukee* (21 Minn., 209), which refers to the case last cited, and holds under a state of facts very similar, that the child was led into the commission of the trespass by the defendant himself, and thus occupied a position different from an ordinary trespasser, and under such circumstances the defendant owed it a duty which it did not owe to ordinary trespassers, and was liable. The decision is put upon the ground that the child was attracted by the turn-table and induced to go there by the conduct of the defendant.

We are not now called to express an opinion as to the soundness of these decisions in such a case; and while we are not prepared to uphold them, it is enough to say that the facts are by no means analogous. A child is permitted to go into the public streets, which are open to persons of all ages, without being chargeable with negligence, and being there, if led by attraction into danger, even although it may be that under some circumstances an action would lie for injuries occasioned thereby, such a case has no similarity to one where the child is left without any one to take especial charge of him and

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escapes through an open, unguarded window to a place of danger and sustains an injury without any allurements being held out to him. A wide distinction exists between the two cases, and while the one at bar is on the border line and the point of difference is, perhaps, very close, this distinction is fully recognized in the best considered adjudications in the courts, and is the turning point upon which cases of this character are to be determined. No case has ever held that the owner of a building rented to a tenant without a covenant that the landlord shall keep the same in repair, is responsible for damages occasioned by neglect to repair, and although, as we have seen, this case, as there was a statutory liability, may, perhaps, be excepted from the general rule, it would be going very far to hold that under circumstances like these the defendant was liable. There is another view of the case which was not presented on the argument, but which should not be overlooked. If there was any liability for negligence, this obligation was in part created by a failure to protect the infant children of the tenants from injury by restraining them from getting on the fire-escape. As to adults, it is to be supposed that their own judgment and discretion would answer that purpose. As to those of immature years, if the window had been temporarily protected, as is quite usual when young children are liable to be exposed to danger, the accident would not have occurred. A temporary gate or bars would have effected that object. The owner clearly was not called upon to provide this protection. Ordinarily, the tenant provides such protection for the safety of the members of his family who may require it. But without considering whether there was negligence of the tenant in this respect which exempted the defendant from liability, it is entirely apparent for the reasons already stated, that the action cannot be maintained. There was error in the trial in denying the motion for a nonsuit, and the judgment of the general term affirming the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur except CHURCH, Ch. J., dissenting.

Donovan agt. Board of Education.

N. Y. SUPERIOR COURT.

THOMAS DONOVAN agt. THE BOARD OF EDUCATION OF THE
CITY OF NEW YORK.

Negligence — Corporation — when action will lie against, for negligence of its corporate duties — Complaint — Answer.

The board of education was expressly created a corporation for all the purposes of the act creating it, with power to take and hold property, both real and personal, devised and transferred to it for the purposes of public education in the city of New York.

An action will lie against the board of education of the city of New York for negligence in the execution of its corporate duties.

It is made the duty of the board of education (by the statutes which created it) to have the safe-keeping of all premises used for public ward schools in the city of New York, and to examine the safety of all school premises, and to see that the same are kept safe and in good order.

Held, that an action will lie to recover damages for personal injuries sustained by plaintiff by falling into an unguarded opening extending from the yard of a public school building into the cellar of said building in consequence of the negligence of the defendant (the board of education) allowing the covering thereof to be left open.

Where the complaint alleged that the defendant was a corporation created by, and existing under, the laws of the state of New York, and that as such it was not only its duty to see that the school premises in question were kept safe and in good order, but also that it occupied and had the control and safe-keeping of the same, with the appurtenances, &c., &c. :

Held, that these allegations sufficiently aver the legal capacity of the defendant to be sued, and as they are expressly admitted by the answer, the defendant is not in a position to insist that the duty averred rested upon, and the use and occupation in truth was by and in, the trustees of the ward in which the premises are situate, and that if there was any negligence, it was by an employe of the trustees of the ward, for whose act or omission the defendant is not responsible.

A party who formally and explicitly admits, by his pleading, that which

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establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission.

General Term, May, 1878.

THE action is brought to recover damages for personal injuries sustained by the plaintiff on the 22d of November, 1875, by falling into an unguarded opening extending from the yard of a public school building, in Vandewater street, in the city of New York, into the cellar of said building, in consequence of the negligence of the defendant, in allowing the covering thereof to be left open.

The answer is in effect a general denial of all the allegations of the complaint, with the exception of the following, which it expressly admits:

I. That the defendants are a corporation created by and existing under the laws of the state of New York.

II. That the plaintiff is an infant under the age of fourteen years, and is the son of William Donovan aforesaid.

IV. That it is the duty of the defendant as the board of education aforesaid to have the safe-keeping of all premises used for public ward schools in the city of New York and to examine the safety of all school premises, and to see that the same are kept safe and in good order.

V. That the defendant, at the time hereinafter mentioned, occupied a certain building and premises situate in Vandewater street, near Pearl street, in the fourth ward, of the city of New York, and had the control and safe-keeping of the same, with the appurtenances, which premises are known as grammar school No. 1, and are used under the direction of the said board of education as one of the public schools of the city of New York, and was frequented by children attending said public school.

Upon the trial before the court and a jury, the complaint was dismissed and plaintiff was not permitted to give evidence thereunder.

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Plaintiff excepted to such ruling, and his exception was ordered to be heard at general term in the first instance.

Thomas & Wilder, attorneys, and *Edward P. Wilder*, of counsel, for plaintiff.

Wm. C. Whitney and *D. J. Dean*, of counsel, for defendant.

By the Court — FREEDMAN, *J.* — The complaint having been dismissed at the trial before any proof was offered, the position of the parties is substantially the same as upon a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. For the purpose of determining whether it does or not, every allegation contained in it must be taken as true.

The complaint alleges that the defendant is a corporation created by and existing under the laws of the state of New York, and that as such it was not only its duty to see that the school premises in question were kept safe and in good order, but also that it occupied and had the control and safe-keeping of the same, with the appurtenances, &c., &c.

These allegations sufficiently aver, at least so far as the rules of pleading require it in cases of ordinary corporations, the legal capacity of the defendant to be sued, the duty imposed by law, and the occupation and use of the premises by the defendant. Moreover, they are expressly admitted by the answer, and hence the defendant was not, and is not now, in a position to insist that the duty averred rested upon, and the use and occupation in truth was by and in, the trustees of the ward in which the premises are situate, and that if there was any negligence it was by an employe of the trustees of the ward, for whose act or omission the defendant is not responsible.

A party who formally and explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts

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inconsistent with that admission (*Paige agt. Willet*, 38 *N. Y.*, 28; *Ithreyer agt. The Mayor, &c., of N. Y.*, 39 *N. Y. Superior Ct. R.* [7 *J. & S.*], 1).

The defendant being thus concluded, and the complaint averring in addition and with sufficient precision, an injury to the person of the plaintiff in consequence of the negligence of the defendant, the dismissal of the complaint can only be sustained, provided, under the statutes relating to the board of education, no action whatever lies against it for negligence in the execution of its corporate duties.

Upon this branch of the case it has been argued :

1. That the board of education is an agency purely governmental, having no powers or franchises other than those which it is empowered and compelled to exercise for the public benefit, from which it derives no revenue or emolument as corporation, and, therefore, is not liable for the consequence of neglect of an agent necessarily employed by it, in the absence of an express statute creating such liability.

2. That the duties defined by the statute creating the board fall within the class of purely governmental or public duties, and that as to such duties, even when executed by a municipal corporation proper, endowed with all the powers usually vested in such a corporation, no liability arises for neglect of the agent employed in the execution thereof.

To determine the correctness of these propositions, it will be necessary to examine the statutes of this state relating to the defendant.

From the passage of the act passed April 8, 1805, entitled "An act to incorporate the society instituted in the city of New York for the establishment of a free school for the education of poor children who do not belong to and are not provided for by any religious society," and until the year 1842 the common school education in the city of New York was substantially in charge of the society thus incorporated and whose name was altered in 1826 to "Public School Society of New York."

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The general school act of 1812, and the acts amendatory thereof, never applied to the city and county of New York during that period.

In 1842 the common school system which had prevailed for thirty years in the residue of the state was, by statute, extended to the city and county of New York (*Laws* 1842, p. 184), and the management of the schools to be established under it was placed in the hands of inspectors, trustees and commissioners to be elected by the people. The act permitted the Public School Society and other corporations to continue their existing schools and to participate in the public funds according to the number of their schools, but such participation was prohibited to any school in which any religious sectarian doctrine or tenet might be taught, inculcated or practiced. Under that act the first board of education was organized.

The new system, as matter of history, met with great opposition from the powerful, compact and disciplined private corporation that had so long enjoyed exclusive charge, but being based on popular suffrage it rapidly grew into popular favor and triumphed over all obstacles. In this contest between the two systems that radically differed in principle the state further interfered by the passage of statutes forbidding the opening or establishing of any kind of new school, in any way whatsoever, without the consent of the board of education.

In 1847 the board of education presented a memorial to the legislature praying for authority to establish a free college or academy. The memorial stated that "one object of the proposed free institution is to create an additional interest in and more completely popularize the common schools. It is believed that they will be regarded with additional favor and attended with increased satisfaction when the pupils and their parents feel that the children who have received their primary education in these schools can be admitted to all the benefits and advantages furnished by the best endowed college

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in the state without any expense whatever." The legislature responded by the passage of a law authorizing the establishment of the free academy, giving the board of education power to direct the course of studies therein, and providing that the question of establishing the same should be submitted to the vote of the people. It was so submitted and carried by a large majority.

In 1851 an act was passed entitled "An act to amend, consolidate and reduce to one act the various acts relative to the common schools of the city of New York" (*Laws* 1851, *chap.* 386). The act provides for the election of two commissioners in each of the wards of the city of New York, and that the commissioners so elected shall constitute a board of education. The second section, as amended by chapter 101 of the *Laws* of 1854, provides as follows :

"The board of education shall have power :

1. To take and hold property, both real and personal, devised or transferred to it, for the purposes of public education in the city of New York.

* * * * *

4. To establish new schools as hereinafter provided.

* * * * *

8. And, for the purposes of this act, the said board shall possess the powers and privileges of a corporation."

By the twenty-fifth section, as amended by section 14 of chapter 301 of *Laws* of 1853, it is further provided :

"The title to all school property, real and personal, purchased with any moneys derived from the distribution or apportionment of the school moneys, or raised by taxation in the city of New York, shall be vested in the mayor, aldermen and commonalty of said city, but shall be under the care and control of the board of education, for the purpose of public education, and all suits in relation to the same shall be brought in the name of said board."

In 1853, the contest between the system inaugurated by the state and the Public School Society terminated. The latter

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ceased to exist, and, pursuant to chapter 301 of the Laws of that year, all its corporate property was conveyed and transferred to the mayor, aldermen and commonalty of the city of New York, to be thereafter held by them in the same manner as the school property then used and occupied by the schools organized under the statutes of 1842 and 1851 was held by them.

By section 7 of chapter 574 of the Laws of 1871, amending the charter of the city of New York that had been passed in 1870, the board of education was made a department of the government of the city of New York, and its title changed to "The Department of Public Instruction." But, by chapter 112 of the Laws of 1873, it was again reconstructed and its original title and designation restored. Notwithstanding these changes, all the powers originally conferred were carefully preserved, so that the board of education, as now constituted, possesses the same powers and discharges the same duties which were vested in it prior to 1871.

Numerous other legislative enactments and amendments of the act of 1851 might be referred to, but they are omitted because, though they affected the terms of office of the commissioners, trustees and inspectors, and their mode of selection, and the general organization of the school system of this city, they worked no change in the powers and duties of the board of education as above stated. I shall only add, for the present, that, upon its reconstruction in 1873, the board of education not only succeeded to all the powers and duties of the department of public instruction, but was expressly reinvested with the full control of the public schools and the public school system of the city, subject only to the general statutes of the state upon education.

From the foregoing examination, it clearly appears that the board of education is a governmental agency, created by the sovereign power of the state for the discharge of such powers and duties as were conferred upon it by law; and that in creating it the policy of the state was to instruct and enlighten

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equally the minds of all children needing education, irrespective of the nationality, religion, or pecuniary condition of their parents, and by these means to gradually transform the heterogeneous and uncongenial elements of the cosmopolitan city of New York into an intelligent, virtuous, harmonious and happy people. But from these premises it does not necessarily follow that such agency cannot be sued for neglect of duty. The learned counsel for the defendant, it is true, has cited many cases in support of the theory that such liability does not exist, but most of them are cases in which it was held that political divisions of the state, municipal corporations, or boards of officers exercising public duties only, are not liable, in the absence of a statute creating such liability, for the negligence of independent officers acting under them, whose duties are specifically prescribed by law, and who, though appointed and paid by them, are thus appointed and paid in pursuance of the requirements of a statute. The point decided in these cases is, that there being no control save in strict accordance with the provisions of law, the principle of "*respondeat superior*" does not apply. But in the leading case belonging to that class, and arising in this state, it was conceded, and cases were adverted to to illustrate the concession, that where the duty is imposed upon the municipal corporation itself and not upon public officers appointed by it, and where it accepts the duty and the power to perform it, and itself, by its own agents, sets about the work, or undertakes to set about it by its own agents, then, for negligent omission to do, or for doing in a negligent way, it may be liable (*Maxmillan agt. The Mayor, &c.*, 62 N. Y., 160).

The case at bar is not shown to fall within the class of cases cited by defendant's counsel and above referred to, because the charge of negligence is made by the complaint against the defendant in its corporate capacity, and not against any particular officer or set of officers acting under its authority. Not even the word "agent" or "servant" is used. True, the defendant can act only through agents, but in the absence of

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proof of particulars, and especially in view of the admissions contained in the answer, it cannot be assumed that the negligence complained of was a negligent act or omission on the part of an independent officer, of whom the defendant is not the superior.

There is another class of cases which are equally inapplicable, in which it was held that persons spoken of as a concrete body could not be sued in their collective capacity, because they were not in law a corporation (*Gardner agt. Board of Health*, 10 N. Y., 409; *Brady agt. The Suprs.*, 10 *id.*, 260).

Nor would it answer any useful purpose to consider in what instances the commissioners constituting the board of education might, perhaps, incur an individual liability.

In addition to being a governmental agency, the board of education is also a corporation. This fact is alleged in the complaint. The answer expressly admits it, and the statutes relating to the defendant expressly provide that for the purposes for which it was created the board should possess the powers and privileges of a corporation. For all such purposes it does possess all the powers and attributes of a corporation. This being so, the courts have held the defendant responsible for its own contracts, and refused to impose any liability therefor upon the mayor, aldermen and commonalty of the city of New York (*Dannat agt. The Mayor, &c.*, of N. Y., 6 Hun, 88).

For the same reason the courts have refused to inflict upon the municipality of New York the responsibility for defendant's torts or negligence (*Terry agt. The Mayor, &c.*, 8 Bosw., 508; *Ham agt. The Mayor, &c.*, 37 N. Y. Superior Ct. R. [5 J. & S.], 458, and affirmed by the court of appeals, September 16, 1877). And, finally, it has been established that this defendant may be directly sued, as a corporation, by a teacher employed pursuant to law by the board of trustees of a ward (*Gildersleeve agt. The Bd. of Education*, 17 Abb., 201, and cited with approval by the court of appeals in *Ham agt. The Mayor, &c.*).

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In the opinion rendered in that case the general term of the court of common pleas held: "Though the power of appointing teachers is in the trustees, the payment of the salaries is imposed by law upon the board of education, and they are authorized to draw from the moneys which shall be raised for the purpose of public education such sums as may be requisite for the purpose (*Laws of 1851, sec. 735, chap. 386, sec. 2, subd. 5; sec. 3, subds. 1, 2, 5, 7; sec. 9*). They may take and hold property, both real and personal, for the purpose of public education in the city of New York, and for all the purposes for which they were created it is declared that they shall possess the powers and privileges of a corporation (*Id., sec. 2, subd. 1; sec. 8*). If they possess the privileges and powers of a corporation, they must be subject to the obligation incident to the exercise of such powers."

Being thus subject to the obligation stated it is difficult to perceive why the said board should not be liable to an action for the neglect of a duty imposed upon it by law. If the duty had not been imposed upon the board but upon the commissioners or trustees of the ward in which the premises are situate, as such the delinquent commissioners or trustees would be personally liable to the plaintiff (*Bassett agt. Fish et al., Trustees, recently decided by the general term of the supreme court of the fourth department; see N. Y. Weekly Digest, vol. 5, p. 360*). As, however, the case stands at present under the pleadings, the duty for neglecting which the action was brought, must be deemed to have been imposed upon the board in its corporate capacity, and, hence, the inquiry is narrowed down to the simple question whether the board, as a corporation, can be sued for its own neglect of duty imposed upon it by law.

To this it is objected:

1. That the rule holding a corporation liable for such neglect applies only to a municipal corporation, or any other corporate body enjoying franchises and privileges for its own convenience or benefit, and does not apply to those minor polit-

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ical organizations or *quasi* corporations whose corporate powers and functions are conferred without their solicitation for the benefit, not of themselves but of the public at large, and that the board of education belongs to the class secondly referred to ; and,

2. That the amount of money for defraying the expenses of said board, which was formerly apportioned by the state to the county of New York from the common school fund, is now wholly paid from funds raised by taxation, pursuant to an estimate submitted to, and sanctioned by, the board of apportionment in the manner prescribed by section 112, chapter 335, Laws of 1873, as amended by section 20, chapter 757, Laws of 1873.

Similar objections were urged and carefully considered by this court in the highly analogous case of *Clarissey agt. The Metropolitan Fire Department* (1 *Sweeny*, 224). The act establishing that department created a fire district composed of the cities of New York and Brooklyn. The governor and senate were authorized to appoint four commissioners to take and have control and management of all officers, men, property, measures and action for the prevention and extinguishment of fires within the said district, and to be known by the name of the "Metropolitan Fire Department." The department, as thus constituted, was not, in terms, declared to be a corporation ; nor was it made subservient or responsible to any local authority in either city. Its officers and agents were appointed by a power above all local authority, and were held amenable only to the governor and the legislature. But the mode of raising money for its support was by estimates made by the commissioners and the comptroller and the mayor of the city of New York, as a board of estimate, which estimates, when approved by the board of supervisors of the county of New York, had to be levied and collected by said board of supervisors by taxation of the real and personal estate subject to taxation within the county of New York. All real estate, fire apparatus, hose, implements, tools, bells and bell towers, fire telegraph, and all property, of whatever

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nature, then or theretofore in use by the firemen or fire department of the city of New York, belonging to said city, was transferred to the keeping and custody of the metropolitan fire department, and for its use, but the title to all such property remained in the mayor, aldermen and commonalty of the city of New York. In regard to the title of property to be thereafter acquired, the act was silent. Upon full discussion of all the facts and provisions of law bearing upon the case, of which a more detailed mention than already given cannot be made here, and of the authorities cited, the court came to the conclusion that, whether the metropolitan fire department was regarded as a corporation *sub modo*, or as a collective body succeeding, under legislative authority, to the powers and capacities of the old fire department, which had been a corporation, it was, in either aspect, capable of being sued, and might be rendered liable in an action for injuries resulting from the negligence of its agents or servants, or from the faulty, defective or insufficient character of the apparatus used by it in extinguishing fires; and that the existence of difficulty in the collection of any judgment that might be recovered for any such cause was not sufficient to defeat the action.

This decision stands unreversed; nor have I been able to find any case since decided by the court of appeals in which it was questioned or overruled, by implication or in effect. Being, therefore, the law of this court, the two objections lastly considered must be held untenable, especially as the board of education was expressly created a corporation for all the purposes of the act creating it, with power to take and hold property, both real and personal, devised or transferred to it for the purposes of public education in the city of New York.

For the foregoing reasons I am of the opinion that the complaint herein was erroneously dismissed; and that the exceptions taken by the plaintiff to such dismissal should be sustained, and a new trial ordered, with costs to plaintiff, to abide the event.

SEDGWICK, J., concurred.

Grussy agt. Schneider.

SUPREME COURT.

PHILIP GRUSSY, plaintiff and respondent, agt. CHARLES G. SCHNEIDER, defendant and appellant.

Tender of interest — how and to whom made.

A mortgage debtor must seek his creditor to pay the interest on his mortgage, if he is within this state, and for this purpose must go to the residence or place of business of the mortgagee.

A tender of interest, if not made to the creditor, must be to one authorized by him to receive it (*S. C.*, 50 *How. Pr.*, 134 [*where the facts appear affirmed*]).

General Term, First Department, May, 1876.

APPEAL from a judgment of foreclosure.

Wm. H. Arnoux, for appellant.

Geo. A. Black, for respondent.

BRADY, *J.* — The opinion of the learned justice who presided at the special term when this cause was tried, delivered by him (50 *How. Pr.*, 134), satisfactorily and fully disposed of the question presented on this appeal. It is only necessary to add to the cases cited by him that of *Hale agt. Patton* (60 *N. Y.*, 233), which had not been decided when his views were expressed. In that case it is determined that the mortgage debtor must seek his creditor to pay his interest, if he be within the state, and that rule rendered it obligatory upon the defendant herein to go to the plaintiff's residence or place of business and tender the interest. It also holds, substantially,

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what is in accord with the cases cited by justice VAN VORST, that a tender of the interest, if not to the creditor, must be to one authorized by him to receive it. If Mr. Black had been employed to collect the interest, his authority to receive it would be presumed and the tender would have been regarded as sufficient. It is clear, however, on the evidence, that Mr. Black was not employed to collect the interest, and he disclaimed authority to receive it on two occasions when it was tendered. The defendant was thus advised in time and suffers from his own laches if he suffer at all. The plaintiff asks the enforcement of his rights, and though it seems to be harsh to grant this demand, it cannot be avoided except by arrangement between him and the defendant.

For these reasons the judgment must be affirmed.

DAVIS, Ch. J., and DANIELS, J., concur.

Andrews agt. Schwartz *et al.*

N. Y. COMMON PLEAS.

WILLIAM E. ANDREWS agt. DAVID SCHWARTZ *et al.*

Attachment—when will be vacated—what are not sufficient grounds for granting same.

An attachment should not issue unless it clearly appears that but one construction is to be placed on the acts of the party against whom the attachment is asked—a construction unfavorable to honesty.

Persons who are sued have a perfect right to give up business if it does not pay, or their factory or place of business is burned out, to collect their debts and assets, and to pay or secure their creditors.

There is nothing in these circumstances to warrant the granting of an attachment on the ground that defendants were about to dispose of their property, and to leave the state, in order to defraud their creditors.

Special Term, May, 1878.

MOTION to vacate attachment.

Action commenced June 16, 1877. Attachment procured April 23, 1878, on the ground that defendants were about to dispose of their property, and to leave the state, in order to defraud their creditors.

J. F. DALY, J.—This action was brought upon an unliquidated demand for certain royalties alleged to be due from defendants to plaintiff upon the manufacture of oil from animal fat under a process of which plaintiff is patentee. The demand is denied by defendants, and the cause is at issue. Several months after the action was commenced, the factory of defendants, in One Hundred and Seventeenth street in this city, was destroyed by fire, and their business ceased. This

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is the explanation of their going out of business. They have sold what remained of their machinery or utensils for a small sum, and have contracted to sell a quantity of oil, the balance of their stock, and are collecting the insurance on the property destroyed by fire. One of the defendants, Schwartz, left the city after the fire and went to Texas. It is said that he is to return. A large part, if not all, of the insurance has been assigned by defendants to one alleged creditor, Jacob W. Riglander, their broker. The only creditors of defendants, except the plaintiff and Riglander, are Michael Madden, their former foreman, who claims a balance of wages, which is disputed, and other workmen whose names and the claims are not set forth in plaintiff's affidavits. The foreman swears that it was the expressed intention of defendants to go out of business some months before the fire. Certain neighbors of defendants swear to suspicions and rumors, in the neighborhood of defendants' factory, as to incendiary intentions of defendants prior to the fire, with respect to the factory. Another witness swears to certain admissions of one of the defendants of sharp practice on his part in Texas some years before, which the witness surmises indicates a swindling propensity on the part of one or both the defendants. Another witness swears to a recent transaction of defendants (in selling the oil before referred to), from which it is intended the court should assume a purpose on defendants' part to cheat the person with whom they contracted and dealt.

Stripped of all that is not evidence the plaintiff's proofs wholly fail to satisfy me that defendants intend to realize on their assets and abscond in order to defraud him or the other unsecured creditor.

The only claims against them the defendants dispute. The alleged fraudulent disposal of property took place long after plaintiff's action was at issue. No other actions have been commenced against them, except one by Madden which they contest. Motive for the alleged fraud is wanting.

The deliberateness of defendants' proceedings is evidence

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of good faith. Plaintiff's own witness, Madden, swears that as early as October last defendants instructed him to discharge their employes as they were going to give up business. The fire occurred four months after. Not till after the fire is any disposition of assets shown. Then it takes the form of selling off for \$300, remains of machinery or tools, with some of the wreck left after the fire, property estimated by some witnesses at a value as high as \$2,000, but which value is the subject of dispute. There is nothing extraordinary in the sale of the oil the defendants had stored, nor in their attempting to collect their insurance, nor in assigning it to secure a creditor, if really indebted to him. With the suspicions concerning the fire at the factory we have nothing to do. It cannot be charged that the defendants made such a disposition of that property, as those suspicions imply, in order to defraud the plaintiff.

In fine, I see in defendants' conduct nothing of those circumstances which mark the absconding debtor. No haste, no secrecy, no motive for flying with their assets. Persons who are sued have a perfect right to give up business if it does not pay or their factory is burned out, to collect their debts and assets and to pay or secure their creditors. An attachment should not issue unless it clearly appears that but one construction is to be placed on their acts, a construction unfavorable to honesty. In this case the defendants are not shown to have done any act prejudicial to their creditors, or out of the usual course. They are not bound to refrain from selling what was saved from the wreck of the fire, even for a small price, if, in their judgment, it was as much as the things were worth. Nor are they bound to refrain from collecting the insurance, or selling their goods, or paying off a debt they owe in preference to keeping their funds to abide the event of plaintiff's suit.

The attachment must be vacated, with ten dollars costs.

Victory Webb, &c., Mfg. Co. agt. Beecher *et al.*

SUPREME COURT.

THE VICTORY WEBB, &C., MFG. CO. agt. HENRY WARD
BEECHER *et al.*

Action against trustees of a corporation—complaint—demurrer—separate counts in complaint, what each must disclose—what is not a sufficient reference in one count to preceding counts.

It is a fundamental rule in pleading that where there are separate counts in a complaint each must disclose a distinct right of action. The separate counts are for all purposes as distinct as if they were in separate declarations, and, consequently, they must contain all necessary allegations or the latter must expressly refer to the former.

The complaint contains seven counts, and each of the counts is alleged as a separate and distinct cause of action. The defendants are sought to be held liable for certain indebtedness alleged to have been incurred by the Christian Union Publishing Company, and that corporation is not made a party. It is alleged in the fifth paragraph of the first count that certain of the defendants were, for the first year of the existence of the corporation, its trustees, but there is no allegation of fact showing or tending to show why, as such trustees, the defendants, or either of them, should be held responsible for the debts of the corporation. On demurrer to the complaint:

Held, that the first six counts of the complaint standing alone fail to disclose any cause of action against those defendants who appear from either or any of said counts to have been trustees of the corporation which is alleged to be the debtor of the plaintiffs.

Held, further, that, unless there is something which can be construed as a general allegation referring to each and every of the first six counts, and connecting such general allegations with each of such counts, the demurrer must be sustained as to the several causes of action contained in those counts.

Held, also, that the twenty-first paragraph of the complaint, which is one of the subdivisions of the seventh or last count, which contains an allegation concerning the failure of the trustees to make and publish a

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report, does not in any way refer to the six preceding separate and distinct causes of action, and the demurrer as to these must be sustained. The allegation in the seventh count, that the defendants were the trustees of the Christian Union Publishing Company, and that they had made default in filing their annual report, goes to show the liability of the defendants as trustees.

It is averred in the seventh count that the machine was constructed under the direction of the corporation.

Held, that this is equivalent to a command that the machine should be constructed for the company by the plaintiffs, and therefore amounts at least to a request.

Special Term, February, 1878.

THE complaint contains seven causes of action, described as counts, each count being separately stated and numbered, and declared to be a separate and distinct cause of action. The defendants have demurred to each count separately, as stating no cause of action.

The first count sets forth a contract between the plaintiffs and the corporation called the Christian Union Publishing Company, for the sale of a printing machine alleged to be worth \$20,979, and alleges that the trustees of the company, for one year from October 3, 1874, were the defendants, Beecher, Benedict, Sage, Avery and Howard, and that the company has refused to pay for the machine in question.

The second count alleges that the plaintiffs made a contract with the Christian Union Publishing Company, which required the plaintiffs to send a man to New York to superintend the construction of the machine, the said company agreeing to pay such person's expenses; that such person was sent by the plaintiffs; that the value of his services was \$380, and his traveling expenses were \$190, making in all \$570.

The third count alleges that the Christian Union Publishing Company proposed to the plaintiffs to pay the expense of transporting certain machinery to New York, and of erecting it in their press-room, and in compliance with such proposal the plaintiffs transported and erected the same, and paid for freight the sum of \$116.

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The fourth count alleges that in compliance with the proposal of the Christian Union Publishing Company to pay the expense of transporting certain machinery from England to New York, the plaintiffs transported the same, and in order to do this were compelled to and did pay revenue duties, amounting to \$5,282.06 to the collector of the port of New York.

The fifth count alleges that in compliance with the proposal of the Christian Union Publishing Company, the plaintiffs delivered certain machinery to the company, where it was erected, in and about which erection the plaintiffs necessarily incurred and paid expenses amounting to \$348.21.

The sixth count alleges that the plaintiffs constructed a machine for the Christian Union Company, under the contract mentioned in the first count; that it was delivered to the company, which, however, refused to pay for it, and the plaintiffs were compelled to resume possession of it, under an express agreement that they should not, by so doing, waive any claim under the contract, or any damages against the company. This machine was adapted exclusively for the use of the company, and cannot be sold for any other purpose; that for want of a purchaser the plaintiffs have been compelled to keep the machinery in store, and for the labor of putting it in store, and for storage, they have incurred expenses to the amount of \$186.

The seventh count alleges the same facts as the sixth count, except as to the expense of storage, and further alleges that the plaintiffs have incurred the expense of insuring the machinery, amounting to \$520. This count also alleges, *for the first time in the complaint*, that the defendants were trustees of the Christian Union Publishing Company during the period between January 1, 1875, and December 14, 1875; that they neglected to make the report required by the act of incorporation within twenty days after January 1, 1875, and that no such report was made or published until December 14, 1875.

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The plaintiffs, therefore, demand judgment against the defendants personally, for the total amount of their claims against the Christian Union Publishing Company.

Shearman & Sterling, for defendants, Avery & Ogden.

Lewis & Beecher, for the other defendants. *Thomas. G. Shearman*, of counsel.

I. The Christian Union Publishing Company is not a party to this action. The defendants are all individuals, and the complaint is brought solely for the purpose of enforcing an individual liability against them. The first six counts, however, set forth nothing but contracts with the Christian Union Publishing Company, which, it is alleged, that company failed to perform. There is not a word in any of these six counts which tends to create the slightest personal liability against the defendants. The defendants, Avery & Ogden, are not even mentioned in any of these six counts, nor is any fact therein stated which connects them with the Christian Union Company. As to the other defendants, it is simply alleged that they were trustees of the company, but no default of theirs is averred. The plaintiffs rely upon matters alleged in the seventh count to cure the defects of the first six. But there is not the slightest reference in any of the first six counts to any thing which is contained in the seventh count. Each count must stand alone, and be considered as a separate and distinct complaint, except so far as by express reference it embodies allegations of another count (*Simmons* agt. *Fairchild*, 42 *Barb.*, 404; *Loosey* agt. *Orser*, 4 *Bow.*, 391, 405; *Xenia Bank* agt. *Lee*, 2 *id.*, 624; 7 *Abb.*, 372; *Swift* agt. *Kingsley*, 24 *Barb.*, 541; *Spencer* agt. *Babcock*, 22 *id.*, 326; *Sinclair* agt. *Fitch*, 3 *E. D. Smith*, 677).

II. It has been argued by the plaintiffs, that the twenty-first paragraph of the complaint, which contains an allegation concerning the failure of the trustees to make and publish

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a report, is a general clause relative to the whole complaint, and embodied, in effect, in all the preceding counts. But there is not the least foundation for this argument. The paragraphs of the complaint are numbered consecutively from beginning to end, without regard to the different counts; and under the first count there are twelve different paragraphs. There is, therefore, no reason for assuming that, under the seventh count, there could not possibly be two paragraphs; and that is the plain and natural interpretation to be put upon the complaint. If a clause like this, at the end of a separate, distinct cause of action, can be referred to by an afterthought in order to help out the defects of the other six causes of action, the rule which requires a distinct reference in each count to any thing in other counts intended to be embodied therein becomes an entire nullity.

III. While the seventh count may not be open to the objection that the default of the trustees is not therein alleged, yet that and every other count, except the first, are fatally defective, by reason of their entire omission to aver that the claim *has not been paid*. This point has been so decided by the court of appeals, and is not open to discussion here (*Witherhead* agt. *Allen*, 4 *Abb. Ct. of App.*, 628; *McHarg* agt. *Eastman*, 7 *Robertson*, 137; see *Chambers* agt. *Lewis*, 28 *N. Y.*, 457).

IV. The sixth and seventh counts are bad, for the additional reason that they are founded upon claims for the expense of storing and insuring the machine, *for the whole price of which the plaintiffs claim to recover* in this same action, and without alleging any request or authority from the defendants or the Christian Union Publishing Company for such expenditure.

1. Where the seller of property takes it back for the purpose and with the expectation of reselling it on account of the buyer, there is reason in allowing him to charge for his expenses incurred upon the resale. But in this case it is distinctly averred that no resale of this property could possibly

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be made, and the plaintiffs seek to recover its *entire value* from the defendants, just as completely as if the machine were destroyed by fire. If they are entitled to recover the *whole price*, they had no right to charge the buyer with any thing more, except upon the theory of an express request or authority from the buyer. They can leave the property alone, or store it with some one who is willing to take it as sole security for the expense, or they must take it as their own, and at their own expense.

2. Here no request from the buyer is alleged, nor are any facts stated from which such authority could be inferred. If the buyer will not accept the machine, and does not desire the seller to hold it for his benefit, the seller has no right to decide that the buyer's interests require the machine to be kept, and can not, therefore, involve him in any expense for its preservation.

V. The seventh count, which is the only one alleging any default on the part of the trustees, is peculiarly defective, not only because it fails to allege that the claim has not been paid, and because it does not allege any request on the part of the Christian Union Publishing Company to effect the insurance set forth in this count, but for the further reasons that it nowhere appears in this count that the machine in question was ever purchased by the company, or that the insurance was made for its benefit.

1. It is not averred in this count that the machine was constructed at the request of the Christian Union Company, or under any agreement with it, or that the company ever agreed to pay for the machine. The allegation "That the machine was constructed under the direction of the said company, and to print the newspaper published by them," is very plainly intended for the sole purpose of showing that it was constructed in such a peculiar manner as to make it useless for other purposes, and this fact is, indeed, distinctly averred. A machine may well be constructed "under the direction" of a person, and yet not at his request, nor by his order, nor

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with any expectation on his part that he is to be liable for it. There is not a word in this count from which the law can infer that the machine was not intended as a gift from the plaintiffs to the Christian Union Company, there being no allegation that the machine was sold to the company or purchased by it, or agreed to be so sold or purchased, nor that it was made or delivered at the request of the company. In the absence of such averments, no foundation is laid for the assertion of any liability on the part of the company for this machine, or for any expenses incurred about it.

2. It is not averred that the work was done at the request of the Christian Union Company, or under any agreement with it, or that the company ever agreed to pay for the same. There is nothing stated from which it can be inferred that the machine was not a gift from the plaintiffs to the Christian Union Company. There being no allegation that the machine was "sold" to the company, nor that it was made and delivered "at the request" of the company, no foundation is laid for an action (*Spear* agt. *Downing*, 34 *Barb.*, 522; *Parker* agt. *Crane*, 6 *Wend.*, 647; *Chaffee* agt. *Thomas*, 7 *Cow.*, 358; *Comstock* agt. *Smith*, 7 *Johns.*, 87; *Livingston* agt. *Rogers*, 1 *Cai.*, 583).

3. This count is founded, however, not upon the sale or delivery of the machine, but upon the expense of *insuring* it, which has been paid by the plaintiffs. There is no allegation that this insurance was effected at the request of the Christian Union Company, or in any way authorized by that company, or that the insurance was made for the benefit of the company, with or without authority. On the contrary, it is plain, from the facts stated, that in case the policy of insurance became payable, the plaintiffs would recover its amount and retain it for their own benefit, there being no pretense of an agency or of any fact which would entitle the Christian Union Company to the benefit of the insurance. It is obvious that, in the absence of any such facts, the plaintiffs cannot recover the amount of the insurance. See these

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principles illustrated in *Stillwell* agt. *Staples* (19 N. Y., 401).

VI. The whole argument of plaintiffs' counsel is founded upon the assertion that the causes of action stated in the complaint are not separate or separable; that the last six counts are mere items of damage arising out of the first; and that although they are stated in terms as separate and distinct causes of action, and are separately stated and numbered, the court is, nevertheless, bound to treat them as constituting but one cause of action. To this we answer :

1. It is too late to argue this question, it having been fully considered and decided by this court at another stage of the proceedings. The plaintiffs have elected to treat these claims as separate causes of action; and it does not lie in their mouths to say that it is impossible to do that which they have actually done. Indeed, if there were unquestionably but one cause of action, it would, nevertheless, be entirely competent for the parties, by consent, to split that single claim into any number of claims. Thus, although an action for a single barrel of apples unquestionably sets forth but one cause of action, there is no law to prevent the plaintiff and defendant from setting forth, by mutual consent, each particular apple as a separate cause of action: and after they had consented to do so, and the pleadings had been drawn upon that basis, neither party could insist that the court should treat the cause of action as single. Here is clearly such a consent. The defendants have moved to compel the plaintiffs to separate their claims, and the plaintiffs have done so. It is too late to say that that which has actually been done ought not to have been done, or could not possibly be done. The first proposition is unjust, and the second is absurd.

2. The question may be much simplified by a single counter-question: Could we put in an answer denying only the allegations of the first count in the complaint, and yet prevent the plaintiffs from taking judgment upon each of the six other counts?

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VII. The court of appeals cases cited by plaintiffs' counsel only go to the simple point that the separate statement and numbering of distinct causes of action is a matter of practice, to be regulated by the special and general terms of the supreme court; and that an order of the general term requiring or refusing to require such a separate statement to be made is not reviewable in the court of appeals; but it will be a very long time before the court of appeals decides that when the supreme court *has* ordered such separate statement to be made its order is to be treated as void.

VIII. It is said that the form of the complaint is a matter of no importance, and that although it sets forth these causes of action as distinct, they are still to be regarded as a single cause of action, and the defendant not allowed to demur to each of them separately. But so far from the form in which facts are stated being immaterial, it has been expressly held that where an answer states facts which would constitute a counter-claim, but uses no apt words to indicate that they are relied upon as a counter-claim, they will not be treated as such, and are not admitted by a failure to reply (*Bates agt. Rosekrans*, 23 *How.*, 98; *Burrall agt. De Groot*, 5 *Duer*, 379).

IX. The strongest argument of the plaintiffs' counsel is, that these palpable defects in a pleading which he has amended three times should not be disregarded. In view of the fact that these defects are such as have been adjudged fatal by the court of appeals, on demurrer, in *Witherhead agt. Allen*, and in many other cases of nearly equal authority, we submit that it would be as reasonable to ask that a complaint containing a demand of judgment, without *any* statement of facts, should be liberally construed, and the "slight defect" of the want of any facts be supplied by a broad and generous interpretation of the demand of relief.

X. The defendants are entitled to judgment upon the demurrer.

Lord, Day & Lord, for plaintiffs.

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LAWRENCE, J. — The complaint in this action contains seven counts, and each of the counts is alleged as a separate and distinct cause of action. The defendants are sought to be held liable for certain indebtedness alleged to have been incurred by the Christian Union Publishing Company. The first six counts of the complaint do not contain an allegation of a single fact which shows why or for what reason the defendants should be held responsible for the debts of the Christian Union Publishing Company, and that corporation is not made a party to this action.

It is alleged in the fifth paragraph of the first count of the complaint that certain of the defendants were for the first year of the existence of the corporation its trustees, but there is no allegation of fact showing, or tending to show, why, as such trustees, the defendants, or either of them, should be held responsible for the debts of the corporation. In *Simmons* agt. *Fairchild* (42 Barb., 404) Mr. justice E. DARWIN SMITH in delivering the opinion of the court states "that it is a fundamental rule in pleading that where there are separate counts in a complaint each must disclose a distinct right of action," and he proceeds to quote from Chitty's Pleadings, 413, wherein it is laid down that "the separate counts are for all purposes as distinct as if they were in separate declarations, and consequently they must contain all necessary allegations or the latter must expressly refer to the former (*See, also, Gould's Pl., sec. 3, chap. 4, p. 159; Loosey* agt. *Orser*, 4 Bos., 392; *Sinclair* agt. *Fitch*, 3 E. D. Smith, 677; *The Xenia Branch Bank* agt. *Lee*, 7 Abb., 372, 373; *Spencer* agt. *Babcock*, 22 Barb., 327).

The first six counts of the complaint then standing alone fail to disclose any cause of action against those defendants who appear, from either or any of said counts, to have been trustees of the corporation which is alleged to be the debtor of the plaintiffs.

Unless, therefore, there is something in the complaint which can be construed as a general allegation referring to each and

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every of the first six counts, and connecting such general allegations with each of such counts, this demurrer must be sustained as to the several causes of action contained in those counts. The plaintiff contends that such an allegation is to be found in the twenty-first paragraph of the complaint which is one of the subdivisions of the seventh or last count.

This paragraph does not in any way refer to the six preceding separate and distinct causes of action within the rule stated in *Simmons* agt. *Fairchild* (42 *Barb.*, 404).

I am of the opinion that the demurrer to the first six counts, or alleged causes of action set forth in the complaint, must be sustained.

The case of *Goldberg* agt. *Utley* (60 *N. Y.*, 427), which is relied on by the learned counsel for the plaintiff, simply decided that the provisions of the Code requiring different causes of action joined in a complaint to be separately stated related only to questions of practice over which the court below had control; and in the case of *Bass* agt. *Comstock* (38 *N. Y.*, 21) the court held that a demurrer would not lie to a complaint containing different causes of action which might be united merely because they were not separately stated and numbered. Neither of these cases affect the question now under consideration, and the same may be said in regard to the case of *Wiles* agt. *Suydam* (64 *N. Y.*, 173).

It is, then, only necessary to examine the seventh count for the purpose of ascertaining whether that states a cause of action against the defendants.

This count is not amenable to the objection that there is nothing stated in it which goes to show the liability of the defendants as trustees. The allegation that the defendants were the trustees of the Christian Union Publishing Company and that defendants had made default in filing their annual report is contained in this count.

I am of the opinion that it does sufficiently appear that the machine was built at the request of the corporation. It is averred that the machine was constructed under the direction

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of the company. This is equivalent to a command that the machine should be constructed for the company by the plaintiffs and, therefore, amounts at least to a request.

The defendants are entitled to judgment on the demurrer as to the first six counts, but the demurrer is overruled as to the seventh, and leave will be given to the plaintiffs to amend.

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U. S. DISTRICT COURT.

WILLIS PICKERT agt. THE CANAL BOAT INDEPENDENCE, HER
TACKLE, &c., and E. REMINGTON & SONS.

Mortgages on canal boats — where and how to be filed — Notice.

The provisions of the act of 1833 (*Laws of 1833, chapter 279*), as to the filing of chattel mortgages, so far as they apply to canal boats, are superseded and replaced by those of the act of 1864 (*Laws of 1864, page 993*).

The filing of a mortgage on a canal boat (or a true copy thereof) in the office of the auditor of the canal department (as required by the act of 1864) gives it preference over all claims but existing claims, and, of course, preference over the claims of subsequent purchasers and mortgagees. No other filing is necessary.

A person is not a purchaser in good faith where he purchases with notice of the prior mortgage.

The question as to what is sufficient notice to put a party on inquiry as to the existence of a valid mortgage pointed out.

Southern District of New York, March, 1878.

Beebe, Wilcox & Hobbs, for libellant.

M. M. Budlong, for claimants.

BLATCHFORD, J. — On the evidence I am of opinion that there is a considerable sum of money still due to E. Remington & Sons on the mortgage, and that the notes given to them in March, 1874, were not given in settlement or discharge of the mortgage. *Prima facie*, the claimants are entitled to retain possession of the canal boat under the mortgage.

The provisions of the act of April 28, 1864 (*Laws of New York of 1864, p. 993*) in regard to filing in the office of the

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auditor of the canal department a mortgage on a canal boat and refiling in the same office a copy thereof with a statement of interest within thirty days next preceding the expiration of one year from the original filing of the original mortgage are the same as the provisions in the act of April 29, 1833 (*Laws of New York of 1833, p. 402*) in regard to filing in the office of a register, a county clerk or a town clerk a mortgage on goods and chattels and refiling in the same office a copy thereof with a statement of interest within thirty days next preceding the expiration of one year from the original filing of the original mortgage. It was the law of this state under the act of 1833 (*Newell agt. Warren, 44 N. Y., 244*) that no filing after the original filing of the mortgage and the first filing of the copy, with the proper statement, was necessary in order to make the mortgage a continuing security, and that there need not be a subsequent refiling. The same rule must apply to the canal boat statute. By the act of May 13, 1873 (*Laws of New York of 1873, p. 767*) the act of 1833 was so amended as to require a copy of a mortgage on goods and chattels, with a statement of interest, to be again filed within thirty days next preceding the expiration of *each and every term of one year* "after the filing of such mortgage." The construction in *Newell agt. Warren* (made in 1870) was thus recognized, but no similar amendment was made to the act of 1864. In the present case the act of 1864, as thus construed, was complied with.

It is urged for the libellant that it was necessary, in addition to filing the mortgage, to renew it by refiling in accordance with the act of 1833, because, although the mortgaged property was a canal boat, it was also goods and chattels, and the mortgagor resided when the mortgage was executed in this state, in the town of Mohawk, Herkimer county. I am not referred to any decision of the courts of the state directly upon the point; but the general practice, I understand, has been to file mortgages on canal boats only in the office of the auditor of the canal department. The act of 1864 was a sub-

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stitute for the act of April 15, 1858 (*Laws of New York of 1858, p. 396*). The act of 1858 provided that any person having any lien or incumbrance on any canal boat by a chattel mortgage "duly filed" could file in the office of the auditor a statement of the date, circumstances, nature and amount of his claim, with an affidavit thereto; and that "all claims and liens by chattel mortgage, a statement of which shall be filed as herein provided, shall from the time of such filing have preference and priority over all other claims and liens in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides, but shall not have any priority over existing liens and claims. The act of 1858 was based on the idea of a double filing. It was only where a chattel mortgage had been "duly filed," that is, filed under the act of 1833, that the statement and affidavit could be filed in the office of the auditor under the act of 1858, when both filings had taken place, then under the act of 1858 the lien by the mortgage was to have preference and priority over all other claims on the canal boat except existing claims, to the same extent that claims under mortgages on other property filed under the act of 1833 would have under that act, as to such other property, preference and priority. In other words, as to canal boats, there was made necessary, by the act of 1858, a double filing, and until it had taken place mortgages on canal boats could not acquire the standing which mortgages on other goods and chattels acquired by a compliance with the act of 1833 alone. Then came the act of 1864 superseding the act of 1858 and its provisions, and providing for a single filing in the case of canal boats, and that in the office of the auditor, on the same plan as to filing and refiling as that of the act of 1833 in regard to other goods and chattels. Still more, the act of 1864 went on to provide as follows: "All claims and liens by chattel mortgage which shall be filed as herein provided shall, from the time of such filing, have preference and priority over all other claims and liens, but shall not have any priority over

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existing claims and liens." This enactment strikes out the words "in the same manner and to the like extent of claims and liens arising on chattel mortgages filed and entered in towns where the mortgagor resides," and manifests an intention in connection with the other provisions of the act to dis sever the filing of mortgages on canal boats from the act of 1833 and leave them to depend wholly on the act of 1864. It is enacted that when they are filed as provided in the act of 1864 (which is a filing in the auditor's office alone, and not, as in the act of 1858, a filing of something in the auditor's office in conjunction with a previous filing of something else elsewhere) they shall, from the time of such filing in the auditor's office, have preference over all claims but existing claims, and of course preference over the claims of subsequent purchasers and mortgagees. If some other filing elsewhere is necessary, effect cannot be given to the enactment that the filing under the act of 1864 gives the preference and priority. This makes the provisions of the act of 1833 repugnant to those of the act of 1864 so far as canal boats are concerned, and makes it necessary to hold that the provisions of the act of 1833, so far as they apply to canal boats, are superseded and replaced by those of the act of 1864.

E. Remington & Sons complied, therefore, with all the provisions of law required to make their mortgage a valid continuing security as against the libellant, even if he was a purchaser in good faith. A person is not a purchaser in good faith, within the meaning of the statute in question, when he purchased with notice of the prior mortgage (*Hill agt. Beebe*, 13 *N. Y.*, 556). In the present case the libellant claims to have purchased the boat from his mother, who was the owner and mortgagor. He testifies that he asked her if there was any claims against the boat; that she said the parties of whom she bought the boat were owing her, and that she said nothing about having given a mortgage on the boat. The mortgage was given to E. Remington & Sons for the purchase-money of the boat when the libellant's mother bought it. The libel-

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lant's father and mother testify to the same conversation between him and his mother. After such conversation the libellant went to the auditor's office at Albany and inquired if there was any claims against the canal boat. The person in charge took down a book, and, consulting it, replied that there had not been since 1874. The libellant left without inquiring further. All this was sufficient notice to the libellant. He was bound to inquire further. He had notice that the persons who sold the boat to his mother had had a mortgage on the boat, and that such mortgage had been filed in the auditor's office, and that his mother claimed that the mortgage had been paid. He was bound to seek out those parties whose names were on the book which, through the clerk, he was consulting, and ascertain from them whether they regarded the mortgage as paid. If he had done so, he would have learned that the mortgage was in fact not paid (*Jackson agt. Post*, 15 *Wend.*, 588). His conduct shows that he knew he was bound to inquire, and that he was advised there had been a mortgage filed; but he evidently relied on the view that the mortgage had run out because not refiled from year to year. He had notice enough to put him on inquiry, and he was bound to follow up his inquiry by going to E. Remington & Sons, who were stated in the record before him to be the mortgagees. This was notice to him of every thing to which such inquiry would have reasonably led (*Carr agt. Hilton*, 1 *Curtis C. C. R.*, 390).

The libel is dismissed with costs.

De Bussierre agt. Holladay and others.

SUPREME COURT.

CASSANDRA CALVEET DE BUSSIERRE, plaintiff, agt. BEN HOLLADAY and others, defendants.

Remedies at law and in equity — jurisdiction — action to set aside a will — pleading — motion to dismiss complaint on the trial.

The objection that the plaintiff's remedy upon the facts stated in the complaint is at law and not in equity may be taken at the trial, although not set up in the answer, if taken before the defendant has submitted to the equitable jurisdiction of the action by proceeding to the trial on the merits (*Pam. agt. Vilmar* [54 *How. P. R.*, 285], *as to this point, explained*).

An omission to demur or answer for such cause is no waiver of the objection that the court has no jurisdiction of the action, or that a cause of action is not disclosed by the complaint. The term "*jurisdiction*" in such case explained.

There is no absolute want of jurisdiction in a court of equity to entertain an action to revoke a will or its probate for fraud.

Where a complaint contains a cause of action it cannot be dismissed upon the ground that the plaintiff's remedy is at law and not in equity. The trial must proceed either before the court or a jury according to the nature of the case.

The probate of a will obtained through fraud can be questioned in a court of equity, and may, upon sufficient grounds, be set aside where the court which granted the probate is powerless to give relief.

The *legal* remedy must be clear and ample to justify a court of equity in refusing to entertain an action to set aside a will. Where there is no complete remedy at law equity will entertain jurisdiction. The issues, in so far as they present questions of fact, should, however, be submitted to a jury.

Relief may also be had in such action under chapter 238 of the Laws of 1853.

Special Term, November, 1877.

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MOTION made by defendants' counsel upon the opening of the case by the plaintiff's counsel, and before any proof was offered, to dismiss the complaint.

Butler, Stillman & Hubbard, attorneys, and *William Allen Butler*, of counsel, for plaintiff.

Shipman, Barlow, Larocque, & MacFarland, attorneys, and *William W. MacFarland*, of counsel, for defendant Benjamin Holladay.

William Reynolds Brown, attorney, and *Henry E. Davis*, of counsel, for defendant Mutual Life Insurance Company.

Miller & Peckham, attorneys, and *Wheeler H. Peckham* and *Jno. K. Porter*, of counsel, for defendants August Belmont and another.

VAN VORST, J.— Various grounds are urged for the dismissal of the complaint, but they in the end assume the formal statement made by the counsel for one of the defendants that this being an equitable and not an action at law it does not state a case proper for the consideration of a court of equity.

The same objection, in substance, is interposed by the counsel of another defendant of want of jurisdiction of the court to hear the case, and, further, that the complaint fails to state facts sufficient to constitute a cause of action. These objections are supplemented by the statement that if the plaintiff is entitled to any redress it must be sought at law, and that the allegations of the complaint do not contemplate legal but equitable relief.

For the purposes of this motion every fact averred in the complaint must be considered as true, and every legal intendment from the facts must be in favor of the plaintiffs.

Regarding the objections interposed by the defendants that the plaintiff's remedy is at law through an action of ejectment

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the plaintiff's counsel urges that this objection should have been taken by pleading; and that having answered to the merits without interposing such objection in their pleading the defendants cannot raise it on the hearing.

The rule of the court of chancery upon this subject is stated in *Grandin* agt. *Le Roy* (2 *Paige*, 509): "After a defendant has put in an answer to a bill in chancery submitting himself to the jurisdiction of the court, without objection, it is too late to insist that the complainant has a perfect remedy at law, unless this court is wholly incompetent to grant the relief sought by the bill" (*Hawley* agt. *Cramer*, 4 *Cowen*, 727; *Le Roy* agt. *Platt*, 4 *Paige*, 81).

In all these cases the objection was first taken at the hearing, and after the parties had gone to the expense and trouble of taking proofs.

It was then too late to ask the court to turn the complainant over to a new suit (*Cumming* agt. *The Mayor of Brooklyn*, 11 *Paige*, 596).

In *Truscott* agt. *King* (6 *N. Y.*, 147), being an appeal from a judgment affirming the decree of the vice-chancellor, the rule of the court of chancery was applied, that an objection of this nature came too late at the hearing, it not having been raised in the answer.

In *Cox* agt. *James* (45 *N. Y.*, 557, *p.* 562), GROVER, J., applied the rule to actions in this court, and in terms, said the question whether the plaintiff had not an adequate legal remedy for the disturbance of a right of way did not arise, "as it was not insisted upon in the answer," and in support of his ruling, the learned judge cites *Le Roy* agt. *Platt*, and *Truscott* agt. *King* (*supra*).

The plea and answer to a bill in the court of chancery, differs both in structure and effect from an answer under the Code of Procedure. An objection of the nature we are now considering could be set up by answer or plea. And as after the answer was interposed to the bill of complaint, the proofs were taken, before the cause was brought on for a hearing,

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it was, doubtless, the rule that, by answering and proceeding to take proofs upon the merits of the controversy, the defendant was held to have submitted himself to the equitable cognizance of the action.

But the Code of Procedure in force when the answers in this action were interposed, limits an answer to a general or specific denial of each material allegation of the complaint controverted by the defendant, and to a statement of any new matter constituting a defense or counter-claim (*sec.* 149).

The objection we are considering comes under neither head. It does not involve a denial of the allegations of the complaint, nor does it rest upon new matter, but arises from the plaintiff's own statement of his cause of action.

In this view I do not see that the defendant is called upon, or could well raise this objection by answer.

If the defendants are right in their contention, that this court has no jurisdiction of the subject of this action, such objection could have been taken by demurrer. But neither that objection nor the other, that the complaint does not state facts sufficient to constitute a cause of action, are waived by an omission to interpose them by answer or demurrer (*sec.* 148).

Objections of this character may be interposed at the trial. Both of these objections are now urged, and if they are well taken the complaint must be dismissed, notwithstanding the defendants have answered to the merits.

And if the allegations of this complaint be regarded as addressed exclusively to the equitable jurisdiction of this court, and as not setting up a claim or cause for redress purely legal, and if there be a failure of allegations entitling the party to equitable relief, the same result must follow (*Town of Venice agt. Woodruff et al.*, 62 *N. Y.*, 462, *p.* 467).

The rule prevailing in the court of chancery, proper under its system of pleading and practice, that an objection of this character could not be first taken at the hearing, seems to be inapplicable to the changed conditions under the system which

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now prevails, under which the hearing of the case is not had upon evidence upon the merits previously taken, and which, if taken without objection, might properly be considered as a submission to the equitable cognizance of the action, but the same is taken in court before the judge who decides the cause. *Cessante ratione legis cessat lex.*

I should consider, therefore, that the objection, that the plaintiff's remedy is at law, rather than equity, or that the court, as a court of equity, has no jurisdiction of the matters set up in the complaint, can be taken at the trial at special term, if interposed before the parties have proceeded to the actual trial of the action before the judge, by the introduction of evidence upon the merits. That would be proper to secure, if the complaint contained a statement of a legal cause of action, its disposal in the ordinary manner by a jury.

In the case of *Green agt. Milbank* (*Abb. New Cases*, vol. 3, p. 138), lately tried before me at special term, an objection was interposed that the plaintiff had an ample remedy at law. Such objection was not, however, taken by the defendant's counsel until the evidence was in and the case submitted. Following the rule of the court of chancery, it was stated in the opinion that the objection should have been taken by answer; that was not necessary to have been said under the condition of the case, and the same may be said of *Pam agt. Vilmar* (54 *How. Pr.*, 235).

It is urged by the learned counsel for the defendant, in support of their motion to dismiss, that the plaintiff seeks to set aside a will of both real and personal estate, and to establish another will in its stead, and that a court of equity will not entertain jurisdiction to set aside a will for fraud; that plaintiff's remedy, if any, is at law.

There are authorities, English and American, to the effect that equity will not interfere in such cases when there is an adequate remedy at law (*Brady agt. McCoskee*, 1 *Comst.*, 214; *Clark agt. Sawyer*, 2 *id.*, 498; *Armitage agt. Wadsworth*, 1 *Mad.*, 189; *Herrick agt. Bransley*, 7 *Brown's P. C.*, 437;

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Broderick's Will, 21 Wall., 508; *Colton agt. Ross*, 2 Paige, 396).

The basis of this conclusion is, that the jurisdiction as to the validity of a last will and testament belongs to other tribunals. When a will respects personal estate, it belongs to the ecclesiastical or surrogate's courts, and when it respects real estate it belongs to the courts of common law (*Story's Equity Juris.*, §§ 184, 238, 1445; *Sheffield agt. Duchess of Buckinghamshire*, 1 Atk., 629).

In the case of *Colton agt. Ross* (*supra*) the chancellor said: "If the defendant does not object to the jurisdiction, this court may undoubtedly award an issue *devisavit vel non*, and upon the finding of the jury may pronounce against the validity of a will of real estate. But if the complainant has a perfect remedy at law, and the defendant raises that objection by demurrer to the bill, or insists on it, by way of objection to the jurisdiction of the court in his answer, the complainant should be left to seek his redress in the appropriate tribunal." There is not absolute want of jurisdiction in a court of equity to set aside the probate of a will of real estate, and the will itself. That is conceded in *Colton agt. Ross*, when it is stated that upon the finding of a jury under an issue *devisavit vel non*, the court may pronounce against the validity of a will of real estate.

Brady agt. McCoskee and *Clark agt. Sawyer* (*supra*) hold that a court of equity can adjudicate upon such question when the parties have submitted themselves to the jurisdiction, or when the legal remedy is inadequate, or when it relates to a part only of the real estate embraced in the will.

In *Van Alst agt. Hunter* (5 Johns. Ch., 149) jurisdiction was entertained and fully exercised, but no objection appears to have been interposed of the nature we are now considering (*Rogers agt. Rogers*, 3 Wend., 504, p. 515).

The term jurisdiction, as used in relation to inquiries of this character, does not refer to the naked question of power, but rather to the fact that such power has or has not been usually

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exercised (*Bangs* agt. *Druckinfield*, 18 *N. Y.*, 595), and I am inclined to the opinion that the want of jurisdiction for which a demurrer may be interposed under the Code, and which was not waived by an omission to demur or answer for that cause, is when the cause of action disclosed by the complaint is not properly cognizable by any court of justice to which the provisions of the Code are applicable (*Moak's Van Santvoord's Pleadings*, 737).

If the complaint discloses a cause of action this court, as now organized, has jurisdiction to try it and render a valid judgment therein whether the relief to be awarded be equitable or legal, or both.

A court of chancery would decline to entertain jurisdiction where the remedy at law was clear and adequate. But since the abrogation of that court in this state and the transmission of its jurisdiction and powers to this court it cannot be urged, as an objection to an action therein, that the remedy of the plaintiff is at law and not in equity; for this court has jurisdiction of causes, equitable as well as legal, the one to be tried before the court the other before a jury. The real question to be determined is, does the complaint disclose a cause of action? If it does it cannot be dismissed.

The trial of the action will proceed in such contingency before the court or jury according to the nature of the case (*Davis* agt. *Morris*, 36 *N. Y.*, 569; *Broiestedt* agt. *So. Side R. R. Co.*, 55 *id.*, 220; *Sternberger* agt. *McGown*, 56 *id.*, 12; *Corning* agt. *Winslow*, 40 *id.*, 191, 207; *Phillips* agt. *Gorham*, 17 *id.*, 270).

I apprehend that this conclusion is not at all inconsistent with the statement that when a party has an adequate remedy for redress or relief at law against an instrument which he seeks to have canceled, and his complaint asks such relief only through the equity powers of the court, that his complaint will be dismissed. If entitled to come into court at all affirmatively it could only be for equitable relief, and that will be denied him and he be left to interpose his defense at law

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when the instrument is sought to be enforced against him. That was the ground of the decision in the *Town of Venice* agt. *Woodruff* (*supra*), and other cases of a like nature, of which *Bruner* agt. *Meigs* (64 *N. Y.*, 506) is an illustration. But when the complaint states only an equitable cause of action, which the plaintiff fails to establish on the trial, the cause will not be held to enable the party to make out a legal claim where the facts constituting a legal claim are not stated (*Sternberger* agt. *McGown*, *supra*, page 21).

In the light of these principles the complaint of the plaintiff in this case should be considered. Its allegations, for the purposes of this motion admitted, establish that the plaintiff while under age and incapable of legally acting for herself was the subject of an unnatural fraud perpetrated against her and the infant child of her deceased sister for whom she was a trustee under the will of her mother.

The father and brother of the plaintiff, with their agents and attorneys, combined to secure the substitution of a revoked will, made by the plaintiff's mother, in favor of the plaintiff's father, in 1871, for her last will and testament made in 1873, in favor of her children and grandchildren.

Although this result was secured through the form of law, it was the offspring of collusion between the active parties above indicated.

The testatrix was of sound and disposing mind when the last will was made, and the fact could have been established to the satisfaction of the surrogate by competent testimony, and which was purposely withheld by the persons charged with, and who assumed the duty of, attending to the probate, he acting in collusion with those interested in establishing the prior will. The complaint certainly exhibits facts which entitle the plaintiff to relief. It seeks not only to set aside the probate of the will of 1871, alleged to have been fraudulently obtained, and the will itself, but also the establishment of the will of 1873.

It also asks for the determination of the rights of the plain-

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tiff, in respect to the trusts created by the will of 1873, and the removal of certain mortgages alleged to have been fraudulently placed upon the realty, by the persons chiefly interested under the will of 1871.

Do these allegations entitle the party to equitable relief, or is there adequate remedy by a strict proceeding through an action at law?

I cannot find that there is any redress in the surrogate's court. By admitting the will of 1871 to probate, in so far as it relates to real property, the power in the surrogate was exhausted.

With respect to wills of personal property, there may be further proceedings before the surrogate, if taken within one year from the probate (2 *R. S.*, 61, *sec.* 29; *Matter of last will of Kellum*, 50 *N. Y.*, 299).

But the effect of the probate of the will is to make the record of the same effectual as evidence in all cases as the original will would be if produced and proved, and may be repelled in like manner by contrary proof (*R. S.*, 58, *sec.* 15). The record is not conclusive as to the validity of the will.

But if the probate was obtained by fraudulent contrivance and collusion, and by an imposition upon the court which granted it, and that court be powerless to grant relief, I should say that the probate could be questioned in a court of equity and, if the facts warrant such judgment, that it should be set aside.

"Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice" (*Duchess of Kingston's Case*, 20 *Howell St.*, 538). "It avoids all judicial acts, ecclesiastical or temporal" (*Fenna's Case*, 3 *Rep.*, 78 a).

And the validity of a decree of a court of competent jurisdiction upon parties legally before it may be questioned, on the grounds that it was pronounced through fraud, contrivance or covin of any description (*Earl of Brandon agt. Beecher*, 3 *Cl. & Fin.*, 510; *Perry agt. Middicraft*, 10 *Beav.*, 122; *O'Mahony agt. Belmont*, 22 *N. Y.*, 145; *affirming S. C.*, 5 *Jones & Spencer*, 223; *Ross agt. Wood*, 8 *Hun.*, 185, *lately*

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affirmed in the court of appeals, ALLEN, J.; Dobson agt. Pearce, 2 Kern., 165).

I should conclude that, as far as the probate of the will is concerned, it may be questioned in this action, and that if it should be established, as is alleged, that it was obtained through a fraudulent and collusive arrangement, by which the truth was withheld, and a falsehood allowed to prevail with respect to the competency of the testatrix, that the party obtaining the advantage by such contrivance, should, by judicial decree, be deprived of every advantage which such probate would give him, and the probate to this end be actually annulled.

As to the goodness of the will itself, involving the question whether or not it had been revoked, it is possible that that question might be determined in an action of ejectment, brought by a person entitled to any portion of the land under the will of 1873.

But I do not think that a remedy by ejectment would fully determine all the questions involved, or adequately secure all the plaintiff's rights.

It is to be observed that the question is not whether the will of 1871 is genuine, but whether or not it has been revoked by a subsequent will, equally genuine.

The decree of the surrogate decides that it was not revoked. But that result was procured through fraud.

This plaintiff is not only a devisee in her own right, but she is a trustee under the will for others, whose interests she is bound to protect, and to this end to invoke the aid of the court in appropriate methods.

Courts of equity will entertain actions by a trustee to relieve against frauds of a nature kindred to those under consideration here, by which the right of persons entitled to equitable interests are prejudiced (*Wright agt. Miller, 8 N. Y., 9*). And the claim of the plaintiff to such actual possession of the land as would entitle her to maintain an action of ejectment in her character as trustee may be disputed.

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What the rights of the plaintiff truly are in this regard, remain to be determined.

She has rights and claims, and is under duties legal and equitable, whilst she has a standing in her character as trustee to maintain an action in equity to adequately protect the interests of the *cestui que trust*. Such actions are not disfavored.

All the cases in this state, so far as I have been able to discover, which discuss the propriety of a court of equity entertaining an action to establish a will, or to set aside a will, contain the proviso, that in order to justify the court in refusing to entertain the action, the legal right must be clear and adequate. No complete legal remedy is open to the plaintiff to redress all the wrong, establish all the rights, and administer full relief.

The real estate has been fraudulently, as is alleged, incumbered with mortgages, and to prevent multiplicity of action, equity would seem to favor a single suit, to which all claimants and parties interested should be made defendants, whose rights, as well as those of the plaintiff herself, may be determined by one judgment. And such is this action.

The issues, in so far as they involve the truth of questions of fact, should be submitted to a jury, as is the practice of the courts in cases involving questions of fraud in respect to real estate (*Rogers agt. Rogers, supra*).

But aside from these considerations the act of 1853 (*chap. 238*) provides that the validity of any actual or alleged demise or will of real estate may be determined by this court, in a proper action for that purpose, in like manner as the validity of any deed conveying, or purporting to convey, land might be determined by this court. Issues of fact in such action may be tried by jury or the court, as the nature of the case may require, and the court shall direct.

The terms of this act are sufficiently comprehensive to entitle the plaintiff to bring this action.

The validity of the will of 1871 is questioned, It may be

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determined in this action. Its probate, in itself, interposes no valid obstacle to an inquiry here.

To maintain this action, since the statute of 1853, the invalidity of which complaint is made must be of a character kindred to that which would justify proceedings to question the validity of a deed.

The following cases present questions in which the invalidity of deeds was under consideration: *Lattin* agt. *McCarty* (41 *N. Y.*, 107), *Smith* agt. *Carll* (5 *Johns. Ch.*, 117), *Hay* agt. *Shafer* (6 *N. Y.*, 288), *Marvin* agt. *Marvin* (11 *Abb. P. R. [N. S.]*, 102), also Story Equity Jurisprudence (*sec.* 437, 440).

I think these cases bring the plaintiff's action within the principle of the act of 1853, and the plaintiff's motion to dismiss the complaint should be denied.

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CITY COURT OF BROOKLYN

THE BIRMINGHAM NATIONAL BANK agt. THOMAS KECK.

Corporations — when action to charge stockholder may be maintained — Complaint — Demurrer.

As, by section 37 of the bankrupt act, a discharge from its debts is prohibited to a bankrupt corporation, a debt against it is not discharged, though proven; and the provision of section 21 prohibiting a creditor who has proved his debt from maintaining a suit therefor, does not apply as against a creditor of such corporation.

It follows, therefore, that the mere proving of their claim against a corporation by the plaintiffs, on whose petition, together with other creditors, the company was thrown into bankruptcy, did not restrain them from further proceedings to enforce their claim by suit, and that they are not released from a compliance with the statute which requires the issue and return of an execution unsatisfied, either in whole or in part, before a right of action accrues against a stockholder (*Laws of 1848, chap. 40, sec. 24*).

A compliance with the statutes of this state which give a right of action against the stockholders must be alleged in the complaint. If not so alleged a demurrer will lie.

Special Term, May, 1878.

DEMURRER to complaint.

This is an action, brought by the plaintiff against the defendant, to recover the sum of \$1,575.20 with interest.

The defendant demurs to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action (*Code of Civil Procedure, sec. 488, sub. 8*).

D. H. Ritterband, for defendant. *Michael H. Cardozo*, of counsel.

I. It will be perceived that this is an attempt to charge the

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defendant, as a stockholder of a corporation known as "The American Shovel Company," under and by virtue of the provisions of section 24 of the manufacturing corporation act of 1848. That section of the act is as follows :

"No stockholder shall be personally liable for the payment of any debt contracted by any company formed under this act which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due ; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part."

II. It cannot be disputed but that the action is purely a statutory one, and that, independently of the provisions of the act, no cause of action existed.

The corporation is but a creature of the statute to which it owes its existence, and to that statute alone must we look to ascertain its rights and liabilities and the rights and liabilities of those connected with it (*Gray agt. Coffin*, 9 *Cush. [Mass.]*, 192, 199 ; *The Youghioghenny Shaft Co. agt. Evans*, 72 *Penn. St.*, 331, 334 ; *Pollard agt. Bailey*, 20 *Wall.*, 520, 526).

In *Gray agt. Coffin* (*ut supra*) chief-justice SHAW says : "To create any individual liability of members for the debt of a corporation, a body politic, created by law, and regarded as a legal being, distinct from that of all the members composing it, and capable of contracting and being contracted with as a person, is a wide departure from established rules of law, founded in consideration of public policy, and depending solely upon provisions of positive law. It is, therefore, to be construed strictly, and not extended beyond the limits to which it is plainly carried by such provisions of statute."

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In *The Youghioghenny Shaft Co. agt. Evans* (*ubi supra*), judge AGNEW says: "The liability of stockholders is secondary and the proceedings to enforce it statutory, not existing at common law. It was, therefore, held in several decisions that in such case the proceeding is governed wholly by the statute, and the rights and liabilities of the parties must be ascertained by it (*Brinham agt. Wellersburg*, 11 *Wright*, 45; *Hoard agt. Wilcox*, *id.*, 51)."

In *Pollard agt. Bailey* (*ut supra*) chief-justice WARRE says: "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement."

III. Assuming that the action against the stockholder is commenced within the time limited by the statute, two things must concur and be shown to exist, as against him, before the action can be maintained.

First. A suit for the collection of such debt must have been brought against such company within one year after the debt shall have become due.

Second. An execution against the company must have been returned unsatisfied in whole or in part.

This state of facts must, too, appear upon the face of the complaint, otherwise it is demurrable (*Lindsley agt. Simonds*, 2 *Abb. Pr.* [*N. S.*], 69, *DANIELS, J.*; *Ricklessen agt. Masters*, *city court of Brooklyn*, *gen. term*, 1878, *April*, *McCUE and REYNOLDS, JJ.*).

IV. It is apparent that, in this case, the pleader has wholly omitted to state that any action has ever been commenced against the shovel company for the recovery of the claims against it, stated in the complaint, and hence of necessity no judgment could have been recovered therefor and no execution could have been issued thereon.

The complaint does, however, allege that on August 19, 1876, a petition was filed by the plaintiff on account of the

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indebtedness in the complaint alleged, and other creditors in the district court of the United States for the district of Connecticut, under the Revised Statutes of the United States, title Bankruptcy, for the adjudication of the American Shovel Company, a bankrupt; that thereafter said company appeared and such proceedings were had; that prior to January 13, 1877, said company was adjudicated a bankrupt, and that said plaintiff has proved its claim in bankruptcy against it, and it may fairly be presumed that the theory of the plaintiff's counsel is that this allegation is equivalent to and intended as a substitute for the statutory requirements to which allusion is above made.

It is confidently submitted, however, that this is not so.

(a) The law is undisputed that a discharge is prohibited to a bankrupt corporation. The statute is clear and explicit (*U. S. Stats. at Large*, vol. 15, p. 517, sec 37; and *U. S. Rev. Stats.*, sec. 5122), Our own court of last resort and the highest court of the nation have, in the most distinct and emphatic terms, declared that such is the law (*The Ansonia Brass and Copper Co. agt. The New Lamp Chimney Co.*, 53 *N. Y.*, 123; and *New Lamp Chimney Co. agt. Ansonia Brass and Copper Co.* [same case], 1 *Otto*. 656).

(b) Since, then, a corporation, when once in bankruptcy, cannot obtain a discharge from its debts, does the fact that a corporation is in bankruptcy, *ipso facto*, prevent a creditor thereof from suing and obtaining a judgment against such corporation, and issuing an execution thereon?

It is clearly established that the bankruptcy of the corporation does not have this effect?

This precise point was adjudicated in the case of *The Ansonia Brass and Copper Company agt. The New Lamp Chimney Company* (*ut supra*).

The court of appeals in this case unanimously decided, judge FOLGER writing the opinion (53 *N. Y.*, 124), that, as a discharge is prohibited to a bankrupt corporation, a debt against it is not discharged, though proven; and that the

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section prohibiting a creditor who has proved his debt from maintaining a suit therefor does not apply as against a creditor of such corporation. And this view of the bankrupt act was upheld, without a dissenting voice, in the supreme court of the United States (*See judge CLIFFORD's opinion, 1 Otto, pp. 657, 667*).

This learned judge, at page 666, says: "Many corporations, it is known, are formed under laws which affix to the several stockholders an individual liability, to a greater or less extent, for the debts of the corporation, which, in case certain steps are taken by the creditors, become, in the end, the debts of the stockholders. Such a liability does not, in most cases, attach to the stockholder until the corporation fails to fulfill its contract, nor, in some cases, until judgment is recovered against the corporation and execution issued, and return made of *nulla bona*. Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a *necessary preliminary step* to the stockholder's individual liability."

It is a well-known fact that our present bankrupt act is founded upon the insolvent law of Massachusetts; and there, in the case of *Coburn agt. Boston Papier Mache Manufacturing Company* (10 Gray, 243), SHAW, Ch. J., it was held that proving a claim against a corporation in insolvency, under the Massachusetts Statutes of 1851 (*chapter 327*), and receiving a dividend thereon, would not bar a suit against the corporation for the rest of the debt. At page 244, the learned judge says: "The defendant's counsel contends and argues that, though they have appeared by attorney in this suit and answered, yet that the proceedings in insolvency amount to a total extinguishment of the corporation, and that the suit must, therefore, necessarily abate; but the court are of opinion that there are no provisions in the statute and no circumstances in this case to warrant this conclusion. There is nothing in the proceedings to prevent their continuing to accomplish the end and purpose of their existence, at least until their fran-

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chise or right to act as a corporation is sold under one of the provisions of the statute, if, indeed, such sale would have the effect."

(c) The case of *Shellington* agt. *Howland* (53 *N. Y.*, 371) is in no way in conflict with the position for which the defendant here contends. In that case, in March, 1870, the plaintiff commenced an action before a justice of the peace against The Penfield Paper Company, and before it was determined the defendant Howland, who was a creditor thereof and a stockholder therein, instituted such proceedings against the company, that on the 15th of March, 1870, it was declared a bankrupt; and on that day, on motion of the petitioning creditor, the defendant Howland, an injunction was granted by the district court of the United States restraining the plaintiff from prosecuting his action against the company. Of course, under these circumstances, the court held, when the action was brought against the defendant to enforce his liability as such stockholder, that he having by his own act prevented the performance of the condition precedent, he could not be heard to object to its non-performance. And the entire opinion of judge ALLEN shows that this is the only ground of the decision.

On the other hand, here the plaintiff alleges expressly that the corporation, of which it was a creditor, was adjudicated a bankrupt on the petition of it and other creditors. *Non constat*, therefore, but for its action in joining in the petition this corporation would never have been declared a bankrupt. How, therefore, by a parity of reasoning, can it claim any relief from complying with this "condition precedent" when it has itself (let us assume for the purposes of the argument) placed it beyond its power to comply therewith. Surely it should not be relieved from the consequences of its own act, the effect of its own wrong.

V. In the recent case of *Kincaid* agt. *Dwinelle* (59 *N. Y. R.*, p. 548) it is expressly held that a corporation (organized under the manufacturing act of 1848), which had even been

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enjoined from the exercise of its corporate franchises and deprived of its property and thus had ceased to exist for all practical purposes, was not thereby actually dissolved; and that it could not be dissolved, save by the judgment of a court of competent jurisdiction, and that until such judgment was rendered creditors might proceed by suit against it.

Judge ALLEN, in his able opinion, reviews all the authorities and (*page* 552) expressly says, that "To effect a dissolution of a corporation there must be the judgment of a court of competent jurisdiction declaring it dissolved; and until such judgment creditors may proceed by suit against the corporation, unless restrained by injunction," citing *People agt. President of Manhattan Company* (9 *Wend.*, 351), *In re Reformed Presbyterian Church* (7 *How. Pr.*, 476), *Mickles agt. Rochester City Bank* (11 *Paige*, 118).

The well known case of *Slee agt. Bloom* (19 *Johns. R.*, 456) is examined and shown to be of no application.

Neither is *Penniman agt. Briggs* (1 *Hopkins*, 300; *S. C.*, 8 *Cowen*, 387) of any moment on the question at bar.

They were decisions under the seventh section of the manufacturing corporation act, passed March 22, 1811 (*chapter* 67). (*See* 1 *Revised Laws*, 1813, *pp.* 245, 247).

Section 7 of this act in terms provided "that for all debts which shall be due and owing by the company at the time of its *dissolution* the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company and no further." And under this section, in *Slee agt. Bloom* (*ubi supra*), it was held where a corporation which was organized under this act in December, 1814, held, after December, 1817, no meeting of its trustees, and no act or business was done by the corporation, and on the 1st of February, 1818, all its property, real and personal, was sold by the sheriff on execution, was sufficiently *dissolved* to enable the creditor to maintain his action to enforce the individual liability under the statute.

And in *Penniman agt. Briggs* (*ut supra*) it was held that

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where a corporation had had all its property sold on execution, was utterly insolvent, and had entirely ceased to act in any way as a corporation, it was sufficiently *dissolved* to permit the liability of the stockholder to be enforced.

These authorities do not aid the plaintiff here. No fixing of the liability of the corporation was required under the old statute. *Dissolution*, then, alone, was necessary, and of course *this* had taken place.

Now, clearly, the case is totally different. Surely the change in the statute must have some meaning. If possible, effect must be given to the language of the law. The court cannot legislate. It is neither its policy nor province to do so.

There is now no room for interpretation. The language of the statute is clear and explicit, and nothing but an impossibility of performance, caused by the stockholder himself, should be allowed to dispense with the "condition precedent" which the legislature has created. It is the stockholders' safeguard, for by it the creditor is compelled to first exhaust his remedy against the corporation.

VI. There should be judgment for the defendant on the demurrer, with costs.

Erastus New, of counsel for defendant, cited and relied upon *Shellington* agt. *Howland* (53 N. Y., 371) and *The Ansonia Brass and Copper Company* agt. *The New Lamp Chimney Company* (*id.*, 123).

McCUE, J. — I think the demurrer well taken. The plaintiff does not allege a compliance with the statutes of this state, which give a right of action against the stockholders of manufacturing corporations under certain conditions. One of the conditions is, that an execution against the company shall have been returned unsatisfied in whole or in part. The indebtedness of the American Shovel Company to the plaintiff matured October 16, 1876. On the 19th day of August, 1876, the company, on the petition of plaintiffs and other

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creditors, was thrown into bankruptcy, and, on the 13th day of January, 1877, was duly adjudicated a bankrupt, and thereupon the plaintiffs made proof of their claim against the company. No other or further proceedings have been taken by plaintiffs to collect their claim. It is insisted by the plaintiffs that, inasmuch as the principal debtor became a bankrupt, they are relieved from the obligation to prosecute their claim any further, and that, by the adjudication in bankruptcy, they are now at liberty to sue the defendant, who is a stockholder in the company. The position is not tenable. The case of *Ansonia Brass Company agt. New Lamp Chimney Company* (53 N. Y., 123) is a direct authority upon this point. It is there held that as, by section 357 of the bankrupt act, a discharge from its debts is prohibited to a bankrupt corporation, a debt against it is not discharged, though proven, and the provision of section 21, prohibiting a creditor who has proved his debt from maintaining a suit therefor, does not apply as against a creditor of such corporation. It follows, therefore, that the mere proving of their claim against the American Shovel Company by the plaintiffs did not restrain them from further proceedings to enforce their claim by suit; and that they are not released from a compliance with the statute, which requires the issue and return of an execution unsatisfied, either in whole or in part.

Hand and others agt. Atlantic National Bank.

SUPREME COURT.

ALLEN F. HAND and others agt. THE ATLANTIC NATIONAL BANK, impleaded with others.

Form of action in suit by stockholders of a corporation against its directors for negligence — Necessary parties — Complaint — Demurrer.

A suit in equity against directors of a corporation to recover damages for the waste and loss of the corporate assets caused by the negligence of the directors in the discharge of their official duties, should ordinarily be brought by the corporation.

The stockholders, however, may bring such suit where the corporation is still under the control of the accused trustees.

When the suit is brought by stockholders the corporation is a necessary party defendant.

When such corporation is an insolvent national bank and a receiver of its assets has been appointed by the comptroller of the currency, such receiver is also a necessary party defendant.

The corporation, however, has no interest in the joinder of the receiver and cannot demur upon the ground of his non-joinder.

A complaint in such an action which alleges, as the result of the defendants' negligence, that the plaintiffs' stock became worthless and that they had also been obliged to pay an assessment imposed by the comptroller of the currency under the national bank act in order to pay the debts of the bank, is not demurrable on the ground that several causes of action have been improperly united. Special elements of damage are alleged but only one cause of action.

Special Term, December, 1877.

THIS was an issue of law raised by the demurrer of the defendant, The Atlantic National Bank, to the plaintiffs' complaint. The action was brought by certain stockholders of the bank, in behalf of themselves and of all other stockholders who might join in the suit, against the directors of the bank, with whom was impleaded the bank itself. The complaint alleges, in substance, that The Atlantic National Bank was a banking

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association organized under the national bank act; that in April, 1873, it was insolvent and suspended payment; that the comptroller of the currency, thereupon, appointed a receiver of its assets, who qualified and has since acted as such; that the liabilities of the bank so far exceeded its assets as to entirely absorb its capital stock, and that the comptroller of the currency, in order to pay the debts of the bank, had made an assessment, under the national bank act, upon each stockholder of an amount equal to the par value of his shares of stock; that the insolvency of the bank was caused by the misconduct of the cashier in misappropriating bank funds to a very large amount and using them in stock speculations; that the directors of the bank were negligent in keeping the cashier in office for several years after they knew of his having improperly obtained funds of the bank and having lost them in stock speculations, and in omitting, in various respects detailed in the complaint, to adopt reasonable and customary methods to prevent defalcations by the cashier, or to detect them if they should occur. The relief prayed for is an accounting by defendants, as trustees of plaintiffs, and a judgment for the damage found to have resulted to plaintiffs, respectively, from the defendant's negligence and misconduct in office.

The Atlantic National Bank demurred to the complaint on the grounds that plaintiffs had not legal capacity to sue; that there was a defect of parties in that neither the comptroller of the currency nor the receiver was made a party plaintiff or defendant; that several causes of action had been improperly united, namely, a demand accruing to the bank and passing to the receiver, and several demands of individual plaintiffs for their personal damages, and that the complaint did not state facts sufficient to constitute a cause of action.

S. P. Nash, for plaintiff.

Charles Tracy, for defendant.

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BARRETT, J. — The complaint, in its general features, is good upon the authority of *Robinson* agt. *Smith* (3 *Paige*, 222). But one cause of action is stated, in substance the gross negligence of the trustees, resulting in the waste and loss of the corporate assets. The assessment upon the stockholders is not averred as a distinct cause of action, but as a special element of damage. Possibly it may not be cognizable as such in an equity suit of this nature, but that is a question for the hearing. Ordinarily the corporation should file the bill, but the stockholders may do so where, as here, the corporation is still under the control of the accused trustees. In the latter case, the corporation is necessarily a party defendant.

But, in our judgment, the receiver should also have been joined, and the court will see that he is brought in before final judgment. The trustees are entitled to have all possible claims against them settled in the one suit; and the presence of the receiver is necessary to a complete determination of the controversy.

The defendant corporation, however, cannot demur upon that ground, for the reason that it has no interest in the joinder (*Hillman* agt. *Hillman*, 14 *How. P. R.*, 456; *Newbould* agt. *Warrin*, 14 *Abb. P. R.*, 80).

There must, therefore, be judgment overruling the demurrer, with costs, but with leave to withdraw the demurrer and answer over within twenty days upon payment of such costs.

Cashman agt. Henry.

N. Y. SUPERIOR COURT.

MICHAEL H. CASHMAN, executor, &c., appellant, agt. JOHN F. HENRY and others, respondents.

Grantee of premises, assuming mortgage which grantor has not assumed, not liable for deficiency to mortgagee—effect of acceptance of deed assuming mortgage by married woman—burden of proof in suits upon contracts by married women.

Where the grantor of an equity of redemption in mortgaged premises is not personally liable to the holder of the mortgage for the payment thereof, his grantee incurs no personal liability to the holder of the mortgage, by reason of a clause contained in the deed, whereby the payment of such mortgage is, in terms, assumed and agreed to be paid by the grantee, as part of the consideration of the conveyance.

The rule that an action on a promise made by one person to another for the benefit of a third, may be brought by the third party against the promisor, can be invoked only in cases where the promisee was charged with some legal obligation or duty towards the third party.

The burden of establishing the validity of a contract made by a married woman is upon him who asserts it.

Plaintiff conveyed to S. certain premises and took back a purchase-money bond and mortgage for \$20,000. S. subsequently conveyed the premises to C., a married woman, by a deed stating \$31,000 as the consideration, and containing a clause in the usual form reciting that the premises were conveyed subject to said mortgage, which the party of the second part assumed and agreed to pay. C. subsequently conveyed said premises to H. by a deed, stating \$30,000 as the consideration, and containing a similar assumption clause. In an action to foreclose said mortgage, no evidence was offered, outside the deeds themselves, tending to show that the alleged contract of C. to assume payment of the mortgage was one of that class of contracts which a married woman can make. *Held*, that C. was never personally liable to plaintiff for the payment of such mortgage, nor was her separate estate, other than the mortgaged premises, ever charged therewith; and consequently that H. was not liable for a deficiency upon the sale under foreclosure.

General Term, March, 1878.

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THIS was an appeal by plaintiff from a portion of a judgment entered at special term in an action to foreclose a mortgage. The portion appealed from adjudged that the defendants, Henry, Curran and Bowen, were not liable for a deficiency upon the sale. On October 1, 1872, Cashman, the plaintiff, conveyed certain premises to Simon, and took from Simon a purchase-money bond for \$20,000, secured by the mortgage in suit upon said premises. In June 20, 1873, Simon executed and delivered a deed of the premises mortgaged to Kate M. Cormac. The deed recited that the consideration of the conveyance was \$31,000, the receipt of which was acknowledged in the deed in the usual form. The deed also contained the following clause: "Subject, nevertheless, to a certain mortgage upon said premises" (the mortgage in suit) "amounting in the aggregate to the sum of \$20,000, with interest thereon, which the said party of the second part hereby assumes and agrees to pay, the same forming part of the consideration money hereinbefore expressed." Kate M. Cormac was a married woman. On May 1, 1874, Mrs. Cormac, together with her husband, executed a deed of said premises to the defendants, Henry, Curran and Bowen. This deed contained an assumption clause similar to that in Simon's deed to Mrs. Cormac, and stated the consideration to be \$30,000, the receipt of which was also acknowledged in the usual form in the deed. The plaintiff gave no evidence, outside the deeds themselves, tending to show that Mrs. Cormac was engaged in any trade or business, or had any separate estate, or ever charged her separate estate with the payment of said mortgage, or that her alleged assumption of said mortgage was for the benefit of her separate estate.

Jacob F. Miller, for appellant. An agreement between two parties for the benefit of a third is available to the third party (*Lawrence agt. Fox*, 20 *N. Y.*, 268; *Belmont agt. Coman*, 22 *id.*, 439; *Barr agt. Beers*, 24 *id.*, 178; *Gibert agt. Pelteler*, 38 *id.*, 165). The respondents were personally

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liable unless they could show that their grantor was not liable (1 *Hilliard on Mortgages*, 357; *Blyer* agt. *Monholland*, 2 *Sand. Ch.*, 478; *Ferris* agt. *Crawford*, 2 *Den.*, 595; *Morris* agt. *Oakford*, 9 *Barr [Penn.]*, 499; *Halsey* agt. *Reed*, 10 *Paige*, 595). The burden of proof was upon defendants to show that their grantor was not liable (*Best on Ev.*, secs. 268 to 275; *Greenleaf on Ev.*, sec. 74; *Amos* agt. *Hughes*, 1 *Moo. & R.*, 464; *Huckman* agt. *Ferine*, 3 *M. & W.*, 505; *Willis* agt. *Barber*, 1 *id.*, 425; *Costigan* agt. *Mohawk Co.*, 2 *Den.*, 609; *Leete* agt. *Gresham Life Ins. Co.*, 7 *Eng. L. & Eq.*, 578; *Hollister* agt. *Bender*, 1 *Hill*, 150; *Simson* agt. *Hart*, 14 *Johns.*, 63; *Waterman* agt. *Grover*, 4 *Paige*, 23; *Smith* agt. *Dunning*, 61 *N. Y.*, 249). Mrs. Cormac, by accepting the deed from Simon, became personally liable to pay the mortgage (*Laws of 1848*, chap. 200; 1849, chap. 375; 1860, chap. 90; 1862, chap. 172; *Yale* agt. *Dederer*, 18 *N. Y.*, 265; *S. C.*, 22 *id.*, 450; *Owen* agt. *Canoley*, 36 *id.*, 604; *Ballin* agt. *Dillaye*, 37 *id.*, 35; *Fowler* agt. *Seaman*, 40 *id.*, 593; *Corn Ex. Ins. Co.* agt. *Babcock*, 42 *id.*, 614; *Provost* agt. *Lawrence*, 51 *id.*, 139; *Hier* agt. *Staples*, 51 *id.*, 139; *Hinckley* agt. *Smith*, *id.*, 24; *Fuchling* agt. *Rolland*, 53 *id.*, 425; *Bodine* agt. *Killeen*, *id.*, 93; *Maxon* agt. *Scott*, 55 *id.*, 251; *Loomis* agt. *Ruck*, 56 *id.*, 462; *Manhattan Brass Co.* agt. *Thompson*, 58 *id.*, 83; *Smith* agt. *Dunning*, 61 *id.*, 249; *Westervelt* agt. *Ackley*, 62 *id.*, 506; *Payne* agt. *Burnham*, *id.*, 74; *Conlin* agt. *Cantrell*, 64 *id.*, 218; *Barton* agt. *Beers*, 35 *Barb.*, 78; *Klein* agt. *Gibney*, 24 *How. Pr.*, 31; *Flynn* agt. *Powers*, 36 *id.*, 289; *Walsh* agt. *Powers*, 43 *N. Y.*, 25; *Vrooman* agt. *Turner*, 8 *Hun.*, 78; *Freeman* agt. *Bay*, 4 *Barb.*, 407). As Mrs. Cormac's contract related to her separate estate, it was not necessary that she should charge her separate estate in express terms (*Quaissac Nat. Bk.* agt. *Waddell*, 8 *Supreme Ct.*, 128; *Wiley* agt. *Hutchins*, 17 *id.*, 504; *Costa* agt. *Isaacs*, 24 *Superior Ct.*, 176; *Hoffman* agt. *Treadwell*, 39 *id.*, 188; *McVey* agt. *Cantrell*, 13 *Supreme Ct.*, 528; *Kallo* agt. *De Leyer*, 41 *Barb.*, 208; *Williamson*

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agt. *Dodge*, 12 *Supreme Ct.*, 498; *Kelty* agt. *Long*, 4 *id.*, 164; *White* agt. *Wager*, 25 *N. Y.*, 333; *First Nat. Bk.* agt. *Garlinghouse*, 53 *Barb.*, 616). Mrs. Cormac's separate estate would be chargeable in equity with the payment of the mortgage aside from the New York statutes (*Story's Eq.*, sec. 1401; *Gardner* agt. *Gardner*, 7 *Paige*, 112; *North Am. Coal Co.* agt. *Dyett*, 7 *id.*, 9). The acknowledgment of payment of purchase-money in a deed is *prima facie* evidence of that fact (*Thalheimer* agt. *Brinckerhoff*, 6 *Cow.*, 90; *Grelby* agt. *Grubb*, 1 *Marsh [Ky.]*, 387). The deeds, therefore, prove that Mrs. Cormac had a separate estate of at least \$10,000 over the amount of the mortgage (*Best on Ev.*, 405; *Greenleaf on Ev.*, 74; *Sleeper* agt. *Van Middlesworth*, 4 *Den.*, 439; *Walrod* agt. *Ball*, 9 *Barb.*, 271; *Cooper* agt. *Dedrich*, 22 *Barb.*, 516; *Smith* agt. *N. Y. Central Co.*, 43 *id.*, 225; *Peters* agt. *Fowler*, 41 *id.*, 467). Mrs. Cormac's moral obligation to pay the mortgage was a sufficient consideration for defendant's assumption (*Wilson* agt. *Burr*, 25 *Wend.*, 386; *Doty* agt. *Wilson*, 14 *Johns.*, 378; *Ehle* agt. *Judson*, 24 *Wend.*, 97; *Hawkes* agt. *Saunders*, 1 *Cowp.*, 289; *Lee* agt. *Muggeridge*, 5 *Taunt.*, 35; *Bentley* agt. *Morse*, 14 *Johns.*, 468).

Geo. C. Holt, for respondents. If the grantor of mortgaged premises is not personally liable for the debt to the holder of the mortgage the grantee does not become so by accepting a conveyance in which he assumes to pay it (*King* agt. *Whitely*, 10 *Paige*, 465; *Trotter* agt. *Hughes*, 12 *N. Y.*, 74; *Vrooman* agt. *Turner*, court of appeals, *New York Daily Register*, June 2, 1877). Mrs. Cormac did not become personally liable to pay the mortgage by accepting the conveyance from Simon, because of the disability of coverture (*Yale* agt. *Dederer*, 18 *N. Y.*, 265; *id.*, 22 *N. Y.*, 450; *Eustaphieve* agt. *Ketchum*, 6 *Hun.*, 623; *Manhattan Brass Co.* agt. *Thompson*, 58 *N. Y.*, 80; *Schmidt* agt. *Costa*, 3 *Abb. Pr. [N. S.]*, 188; *Robinson* agt. *Rivers*, 9 *id.*, 144; *White* agt. *McNett*, 33 *N. Y.*, 371; *Knapp* agt. *Smith*, 27 *id.*, 277; *Ledeliey* agt.

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Powers, 39 *Barb.*, 555; *Baker* agt. *Hardee*, 6 *T. & C.*, 440; *Kinne* agt. *Kinne*, 45 *How. Pr.*, 61; *Brown* agt. *Hermann*, 14 *Abb. Pr.*, 394; *Coakley* agt. *Chamberlain*, 1 *Sweeny*, 676; *Kidd* agt. *Conway*, 65 *Barb.*, 158; *Phillips* agt. *Wicks*, 4 *Jones & Sp.*, 254; *Hoffman* agt. *Treadwell*, 7 *id.*, 184; *Payne* agt. *Burnham*, 62 *N. Y.*, 74; *Hansel* agt. *De Witt*, 63 *Barb.*, 53). The burden of proof was upon plaintiff to show affirmatively, by evidence outside the contract itself, that the alleged contract of assumption was one which a married woman could legally make (*Hallock* agt. *De Munn*, 2 *T. & C.*, 350; *Kidd* agt. *Conway*, 65 *Barb.*, 158; *Nash* agt. *Mitchell*, court of appeals, *MS.*, opinion referred to in *Albany Law Journal* December 15, 1877). An action does not lie in a promise made by one person to another for the benefit of a third unless the promise was under a legal obligation to the third party (*Vrooman* agt. *Turner*, *supra*; *Gamsey* agt. *Rogers*, 47 *N. Y.*, 233; *Merrill* agt. *Green*, 55 *id.*, 270).

SANFORD, J. — Where the grantor of an equity of redemption in mortgaged premises is not personally liable to the holder of the mortgage for the payment thereof, and has no interest in such payment, legal or equitable, except in so far as the mortgage may be a charge upon the mortgaged lands, his grantee thereof incurs no personal liability to the holder of the mortgage, by reason of a clause contained in the deed, whereby the payment of such mortgage is, in terms, assumed and agreed to be paid by him as part of the consideration of such conveyance (*King* agt. *Whatly*, 10 *Paige*, 465; *Vrooman* agt. *Turner*, decided by the court of appeals, April 10, 1877, but not yet reported; vide 4 *N. Y. W. Dig.*, 504; *N. Y. Daily Reg.*, June 2, 1877). The case last cited carefully and clearly distinguishes the principle upon which exemption from liability is accorded to the grantee of mortgaged premises, under the circumstances above stated, from the rule adopted in that class of cases of which *Lawrence* agt. *Fox* (20 *N. Y.*, 268) is an example, and in which it has been

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held that an action sometimes accrues in favor of one, for whose benefit a promise has been made to another, against the promisor, upon the breach of such promise. It holds, that in order to give the third party, who may derive benefit from the performance of the promise, a right of action against the promisor, there must be in him a legal right to adopt and claim the promise as made for his benefit, founded upon some obligation or duty on the part of the promisor toward himself.

Where no such obligation or duty exists, as, for instance, where a grantor of mortgaged premises is not personally bound for the payment of the mortgage debt, the rule adopted in that class of cases cannot be invoked. The principle, upon which a grantee, who assumes payment of a mortgage debt for which his grantor is personally liable, may be directly pursued by the mortgage creditor, or held for any deficiency in the proceeds of a sale of the mortgaged premises, is involved in and grows out of the equitable doctrine of subrogation, whereby a creditor is entitled to the benefit of any security, held by surety, for the payment of the debt due him. As between the grantor, liable for the payment of a mortgage, and his grantee, who assumes and agrees with him to pay it, the latter becomes, in equity, the principal debtor, the former a surety for the payment of the debt. The creditor, under the rule of subrogation, may resort to the rights and remedies available to the surety who is charged with an obligation or duty toward himself, and may enforce them in the same manner and to the same extent as the surety himself may do. But if the grantor be not chargeable with any liability to the holder of the mortgage, no relation of suretyship exists as between him and his grantee, and the rule of subrogation is, therefore, wholly inapplicable to any promise or undertaking made by the grantee in his favor.

It would seem to follow from these premises, that unless Kate M. Cormac was personally liable to the plaintiff for the payment of the bond and mortgage in suit, or for a deficiency

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upon the sale of the mortgaged premises, no right of action accrued to him or exists in his favor, as against her grantees, the present defendants. In other words, unless the plaintiff's claim can be enforced against her, neither can it be enforced against those to whom she may have recourse, by way of indemnity, in case of its enforcement against herself. He can only be entitled to subrogation to her rights and remedies by reason of her obligation or liability to himself.

We have, therefore, to inquire and determine whether, under and by virtue of the assumption clause contained in the deed to herself, Kate M. Cormac, the defendants' grantor, became personally liable to the plaintiff for the payment of his mortgage, or so charged her separate estate with liability for its payment, as to be legally or equitably interested in having it paid, after she ceased to have any interest in the lands upon which it was a specific lien. If she was under no obligation to the plaintiff in respect to it, and had no interest in securing its payment, except to the extent that it charged those lands, the plaintiff acquired no right and can enforce no remedy against the defendants under and by virtue of their covenant of assumption contained in the deed from her. It affirmatively appears that she was a married woman at the date of the conveyance to herself. Her coverture precluded her from contracting, and her disability rendered her contracts void, except in so far as the provisions of the married woman's acts imparted validity to them. The *onus* of establishing the validity of a contract made by a *feme covert* is upon him who asserts it. It was earnestly insisted, upon the argument, that the burden of proof was upon the defendants to show that their grantor was not liable. Such is not the correct view to take of the relations subsisting between the parties. The plaintiff claims that the defendants are liable to him. To establish such liability he must show that the defendants' grantor with whom they contracted, as he alleges for his benefit, was under some obligation to him, from which it can be inferred that the contract with her was intended to have that

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effect. The plaintiff was, therefore, under the necessity of proving against them the state of facts which would have been requisite, if he had sought to establish the liability of their grantor against herself. To establish her liability it would have been essential that he should prove not only a contract, but a contract within the statutory exceptions. As no intention to charge her separate estate was expressed in the instrument or contract, by which her liability is supposed to have been created, it should have been made to appear by proof, on the part of the plaintiff, either that such liability was assumed in the prosecution of a trade or business carried on by the wife, or that it had relation to and was incurred for the benefit of the wife's separate estate (*Manhattan B. and M. Co. agt. Thompson*, 58 *N. Y.*, 80). No evidence was adduced tending to establish either of these conditions. As was said in *Nash agt. Mitchell* (*opinion of court of appeals, reversing 8 Hun*, 471, *vid. Albany Law Journal*, December 15, 1877), "the law does not authorize the presumption, and courts cannot assume without evidence, that a simple contract, without any thing on its face to indicate the fact, was made for the benefit of the estate of a married woman." The same case is full authority for the proposition that the burden of proof is upon him who asserts, and not upon him who impugns, the validity of a contract made by one under the disabilities of coverture. The proofs would not, in my opinion, have warranted a finding that Mrs. Cormac ever became personally liable to the plaintiff for the payment of his mortgage, or ever charged the payment thereof upon her separate estate.

The costs of the issue, tendered by the answer, were in the discretion of the court below. I am of the opinion that such discretion was wisely and properly exercised.

The judgment, so far as appealed from, must be affirmed, with costs against the appellant.

CURTIS, Ch. J., concurring.

Mandel *et al.* agt. Mower *et al.*

SUPREME COURT.

MARY W. MANDEL *et al.* agt. SAMUEL B. MOWER *et al.*

Liability of agent for moneys collected by sub-agent.

Collection agents, to whom notes are intrusted for collection, are liable for moneys received by attorneys employed by them, and which are not paid over.

June, 1878.

THIS action was commenced by the plaintiffs against the defendants, who composed the firm of Mower & Crosby, collection agents, to recover the sum of \$400. The facts are these: On July 21, 1874, the plaintiffs delivered to the defendants, for collection, a past-due note for \$400, made by the firm of Leutz, Borie & Co., of Fort Wayne, Ind. The note was entered in a pass-book issued by defendants to plaintiffs, upon which was printed the following receipt: "Received of M. W. Mandel & Bro., for collection, the following described claims, avails of which are to be promptly paid over on receipt by us."

The defendants forwarded said claim for purposes of collection to one James W. Schell, an attorney at law at Fort Wayne, Indiana. Schell collected the amount of the note and failed to remit the proceeds to the defendants. Shortly thereafter he died. Demand having been made upon defendants, and they refusing to pay, this action was commenced. The case was submitted on admitted facts, and was tried by the court without a jury. In rendering judgment for the plaintiffs, the following opinion was rendered:

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Morris S. Wise, for plaintiffs.

A. H. Hitchcock, for defendants.

VAN VORST, *J.*—James W. Schell, the attorney at Fort Wayne, was the agent of the defendants. This is well settled (*Hoover agt. Wise*, 1 *Otto*, 308, and cases cited; *S. C.*, 61 *N. Y.*, 305; *Palmer agt. Holland*, 51 *id.*, 416). In this latter case the defendant, a collection agent in New York, to whom a note was delivered for collection payable in California, was held liable for the omissions of all agents, including the attorney at law to whom the defendant intrusted the same for collection.

The attorney in Fort Wayne being the agent of the defendants, they are liable to the plaintiffs for the proceeds of the note when received by the sub-agent. The defendants would escape liability by the terms of the receipt, in which it is stated that the "avails are to be promptly paid over on receipt by us." I cannot think that the defendants' true relation and liability are at all affected by this language. The money was received by them in law when collected by the sub-agent. The receipt was intended as an assurance of prompt payment over and nothing more. There should be judgment for the plaintiff for the amount collected.

Morgan *et al.* agt. Francklyn.

SUPREME COURT.

JUNIUS SPENCER MORGAN *et al.* agt. CHARLES G. FRANCKLYN
and WILLIAM ALLEN BUTLER, executors, and others.

Subrogation—how and to what extent allowed—principal and surety—Complaint—Demurrer.

It seems to be a settled rule of equity that if "A" owes "B" and he and "C" are bound for it, and "A" gives "C" a mortgage or bond to indemnify him, "B" shall have the benefit of it to recover his debt.

But a private arrangement as to the liability of sureties, as between themselves, comes neither within the rule nor the principles upon which it rests.

The complaint alleged that the plaintiffs, who are bankers, issued letters of credit to the Atlantic De Laine Co. Hoyt, Spragues & Co. guaranteed to plaintiffs that the De Laine Co. would keep its contract, and in default thereof H., S. & Co. would hold plaintiffs harmless of loss. E. H., who was a member of the firm of H., S. & Co., guaranteed to his said firm the payment of any and all sums of money which should remain due and owing to said H., S. & Co. after all the property of the Atlantic De Laine Co. should have been applied to the payment of the debts of said company, the intention of said guaranty being to secure to H., S. & Co. the payment in full of any ascertained balance of account due them by said Atlantic De Laine Co.; and in case of his death his personal representatives were to pay such ascertained balance, for which he would be liable under the above guaranty, without delay, out of his assets in their hands applicable to the payment of his debts. The plaintiffs ask as relief that the balance of account due to H., S. & Co. from the Atlantic De Laine Co. may be ascertained and determined, and that the plaintiffs may be adjudged to be subrogated to all rights of said H., S. & Co. to collect the said balance so to be ascertained from the executors of E. H., and that said executors be directed to pay the assets in their hands applicable to the payment of the debts of said E. H. to the plaintiffs to the extent necessary to satisfy their claims and demands. On demurrer to the complaint by the executors of E. H.:

Held, that the action would not lie. E. H. was, in no just sense, a prin-

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cipal. The only principal was the Atlantic De Laine Co. H., S. & Co. were sureties.

Held, further, that H.'s guaranty was to secure an *ascertained* balance, and it is only when *all the property* of the De Laine Co. shall *have been applied in payment of its debts* that, within the terms of the guaranty, the balance becomes *ascertained*.

Special Term, January, 1878.

THE complaint, as originally served, stated the following as facts, viz.: On the 4th of April, 1873, and at different times afterwards, down to September 11, 1873, J. S. Morgan & Co., the plaintiffs, who are bankers, issued letters of credit to the Atlantic De Laine Company, a Rhode Island corporation.

When each letter of credit was issued the Atlantic De Laine Company agreed to furnish J. S. Morgan & Co. funds to meet their acceptances under such letter. At the same time Hoyt, Spragues & Co., a New York firm, guaranteed to J. S. Morgan & Co. that the Atlantic De Laine Company would keep its contract, and in default thereof that they, Hoyt, Spragues & Co., would hold J. S. Morgan & Co. harmless of loss by reason of having issued said letters of credit.

On the 30th day of June, 1873, Edwin Hoyt, who was a member of the firm of Hoyt, Spragues & Co., guaranteed to his said firm the payment of any and all sums of money which should remain due and owing to said Hoyt, Spragues & Co. after all the property of the said Atlantic De Laine Company should have been applied to the payment of the debts of said company, the intention of said guaranty being to secure to said Hoyt, Spragues & Co. the payment in full of any ascertained balance of account due them by said Atlantic De Laine Company, and in case of his death his personal representatives were to pay such ascertained balance, for which he would be liable under the above guaranty, without delay out of his assets in their hands applicable to the payment of his debts.

The instrument containing this guaranty recited that Edwin Hoyt's purpose was to give his firm his personal guaranty

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against any loss or deficiency which might at any time exist on the account of the Atlantic De Laine Company, for the reason that he was a stockholder of that company while the other members of his firm were not stockholders.

The balance of account due to Hoyt, Spragues & Co. from the Atlantic De Laine Company has not been ascertained. It does not appear that the indebtedness of the Atlantic De Laine Company to Hoyt, Spragues & Co. is limited to payments the latter has made or may make in respect to the plaintiff's letters of credit, or that it does not arise out of transactions with many other parties.

A balance amounting on the 1st of January, 1874, to \$128,591.26 is due to the plaintiff for advances made under the letters of credit and unpaid.

The Atlantic De Laine Company has been adjudged bankrupt and Robert E. Northan, a defendant in this action, has been appointed trustee of its property. The plaintiffs have proved their claim against the Atlantic De Laine Company, but have not received any dividend from its estate.

Augustus D. Juilliard, a defendant in this action, has been appointed receiver of the property and effects of the firm of Hoyt, Spragues & Co.

The plaintiffs recovered a judgment against the surviving partners of the firm of Hoyt, Spragues & Co., January 21, 1876, for \$156,744.57, the full amount of their claim against the Atlantic De Laine Company with interest.

The plaintiffs have received from Juilliard, as receiver, a dividend of ten per cent on their claim of \$128,591.26 against the Atlantic De Laine Company.

Edwin Hoyt is dead and the defendants Francklyn and Butler are the executors of his will. The plaintiffs have presented to the executors a claim against Edwin Hoyt's estate and the executors have rejected it.

The plaintiffs insist that they are subrogated to all the rights of said Hoyt, Spragues & Co. and their successors in interest in respect of said guaranty and indemnity, to them delivered

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by said Edwin Hoyt, and are entitled to have the same enforced for their benefit, and the moneys payable thereon collected and paid upon their said claims and demands.

The plaintiffs ask as relief that "the balance of account due to Hoyt, Spragues & Co. from the Atlantic De Laine Company, may be ascertained and determined, and that the plaintiffs may be adjudged to be subrogated to all rights of said Hoyt, Spragues & Co., to collect the said balance so to be ascertained from the executors of Edwin Hoyt, and that the said executors of said Edwin Hoyt may be directed to pay the assets in their hands, applicable to the payment of the debts of said Hoyt, to the plaintiffs, to the extent necessary to satisfy the plaintiffs' said claims and demands."

The executors of Edwin Hoyt demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them.

The demurrer was sustained and the plaintiffs had leave to amend their complaint, if so advised. Under this permission, they engrafted upon the ninth clause of their complaint the following words, to wit: "And that neither the said Hoyt, during his lifetime, nor his said executors since his death, has or have paid to said Hoyt, Spragues & Co., the moneys due and payable to them by him, nor otherwise satisfied or discharged, and his liability under said writing of guaranty, and his said executors have become now and are liable to pay the same, without delay, out of the assets in their hands applicable to the payment of his debts."

This was the only amendment. The same defendants demurred to the amended complaint and the demurrer was again sustained. The plaintiffs then amended for the second time by adding two lines to the second article of their complaint, and by expanding the ninth article to proportions they could not verify as true. The defendants again demurred.

Thos. H. Hubbard, for Hoyt's executors.

I. The plaintiffs seek relief from Edwin Hoyt's estate under

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a contract made by Edwin Hoyt with Hoyt, Spragues & Co. Their complaint must, therefore, at least, state facts sufficient to show that Hoyt, Spragues & Co. are now entitled to relief against Hoyt's estate under that contract.

The complaint does not state facts sufficient to show that Hoyt, Spragues & Co. are now entitled to such relief, and, therefore, does not state facts sufficient to constitute a cause of action.

(a) The contract was that Hoyt would pay Hoyt, Spragues & Co. such sums as should remain due from the Atlantic De Laine Company to them, *after all the property of the company should have been applied to the payment of its debts.*

(b) The complaint *does not show* that any of the property of the Atlantic De Laine Company *has yet been applied to the payment of its debts ; nor does it state that the company had no property ; nor does it give any reason for bringing an action before such application is made.*

On the contrary it states that the balance of account due to Hoyt, Spragues & Co. from the Atlantic De Laine Company, *has not been ascertained.*

(c) If the property of the Atlantic De Laine Company were in the control of this court, and the plaintiffs should show that there was an improper neglect in applying it as aforesaid, they might, perhaps, ask this court, in one action, to distribute and apply that property and ascertain what balance there remained due to Hoyt, Spragues & Co., and give directions as to the liability of Edwin Hoyt's estate for that balance — though whether such a prayer could be granted is, for many reasons, extremely doubtful.

But the complaint shows that the property of the Atlantic De Laine Company *is in the control of the district court of the United States for the district of Rhode Island.* It follows that the property must be distributed and applied by that court.

It follows, therefore, that this court cannot *now* ascertain what balance will be due to Hoyt, Spragues & Co. from the

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Atlantic De Laine Company, after all the property of the latter has been applied to the payment of its debts.

(d) Inasmuch then as the event has not yet happened from which Hoyt, Spragues & Co. or its representatives could demand relief against Edwin Hoyt or his estate, and inasmuch as the complaint does not state any facts to show that this court should interpose to hasten that event, but does show that the court has not the jurisdiction to hasten it even had the occasion arisen, it does not state facts sufficient to make a cause of action.

(e) The death of Hoyt did not alter the case in such way as to give his firm or any one, an earlier cause of action.

The complaint states that in the event of his death his personal representatives "*were to pay such ascertained balance for which he would be liable.*"

So, in that event, as in case he were living, the balance must be ascertained by the application of all the Atlantic De Laine Company's property to the payment of its debts, and it was only *the balance for which Hoyt would be liable* that his personal representatives were to pay.

It makes no difference that the complaint states that the balance due from the Atlantic De Laine Company to Hoyt, Spragues & Co. amounts to more than sufficient to pay the plaintiffs' debt. Hoyt's guaranty was not to pay his firm what the Atlantic De Laine Company owed it whenever the amount should be as much as the plaintiffs' debt. In fact his guaranty did not mention the plaintiffs or their debt, and does not appear to have had any special reference to either.

II. The plaintiffs would not have any cause of action against Hoyt's executors, even though the time had arrived when a cause of action had accrued in favor of Hoyt, Spragues & Co. Hoyt's guaranty was to indemnify his firm against ultimate loss. It was not made to provide for payment of the plaintiffs' claim nor to increase the security for such payment. The rule of equity that the plaintiffs seek to invoke has no application to the circumstances of this case, and, if applied

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here, it would defeat the operation of elementary principles of law.

(a) The rule which the plaintiffs invoke was first laid down in *Maure agt. Harrison* (1 *Equity Cases Abridged*, 93, case 5). It has since been applied in a long series of cases, but they all refer directly or indirectly to the case mentioned above, and judge PARKER, in the case of *Hopewell agt. Bank of Cumberland* (10 *Leigh* [*Va.*], 206), says he had found no other case deciding the same thing, though in many other cases and in the text-books it is assumed as a settled principle.

Maure agt. Harrison appears to have been decided in 1692 and was reported in 1756. The whole report of the case is this, viz. :

"A bond creditor shall in this court have the benefit of all counter bonds or collateral security given *by the principal to the surety*, as if A owes B, and he and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt."

The reason of this rule is that if the principal debtor has set aside or dedicated certain property for the better security of a particular debt, it ought to be applied to the payment of that debt rather than to the payment of creditors at large ; and, although ordinarily the application should be made by the surety who holds the security, yet when there is danger he may not make it, courts of equity, in order to avoid the circuitry of actions by the creditors against the principal and the surety, and by the surety to enforce the security, will allow the creditor to enforce the security by an action in his own name. The rule can properly be applied only in those cases where the security has been set aside or *given by the principal debtor* and where it has been given for the *better protection* of the particular claim in question."

It should be set aside by the principal debtor, because it is against *him* and *his property*, and not against *sureties* or strangers, that the creditor has *equities*. It should be set aside for the better protection of the particular claim in question,

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because if it is only a general indemnity, the general creditors of the party giving it would, after it has operated to protect the surety indemnified, have equal claims to it.

Moreover, when the rule has been applied, it has always been so applied as to protect the surety who holds the security, as well as the creditor who seeks the benefit of it.

It has sometimes been discussed whether the surety must not first apply the security as far as it will go to the payment of the debt and then remain bound for the balance of the debt to the extent of his own undertaking as a surety. But it has never been held that the surety must pay to the extent of his undertaking, and then, in addition, surrender the security he has received for his own indemnity. The rule is intended to prevent the surety from avoiding his own obligation by dishonesty or insolvency, and then applying the security he has received to his own uses or the payment of his general creditors.

The foregoing outline of the law is drawn from the authorities which abundantly support it.

In *Wright agt. Morley* (11 *Vesey*, 12, p. 21), the master of the rolls said, "I conceive that as the creditor is entitled to the benefit of all the securities the *principal debtor* has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor."

In *Ex parte Waring*, (19 *Vesey*, 345, *reported more fully in 2 Rose Bankruptcy R.*, 182), lord ELDON allowed the creditors to work out their equities through and subject only to the rights of the party indemnified (though that party was not a surety, but the acceptor of bills drawn by the party who furnished the security), and held that the doctrine of *Mauve agt. Harrison* only applied to cases where the surety received his security *as trustee for the creditor*, in such way that he could not relinquish or change the security after it came to his hands.

In *Ex parte Perfect* (*Montague's R.* [*Bankruptcy*], 25), the vice-chancellor said, the doctrine of *Ex parte Waring*

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was that "the depositaries were to be indemnified by applying the proceeds of the security in the payment of the bills as far they would go."

In *Hopewell agt. Bank of Cumberland* (10 Leigh. [Va.]), the court said, "It is conceded, if a surety is bound for the debt and is indemnified by the *principal debtor*, the creditor may pursue the indemnity in *exoneration* of the liability of the surety."

In *Ten Eyck agt Holmes* (3 Sandf. Ch. R., 428), the security was given by the principal debtor and the court allowed the creditor to avail of it, because it was for the absolute payment of the debt * * and not merely to indemnify "the indorser against his indorsement."

In *Pratt agt. Adams* (7 Paige, 615, p. 627), the chancellor said, "and it has been settled by a long course of judicial decisions, that where a person, standing in the situation of indorser or surety, is furnished or provided by the *principal debtor*, with a fund or with collateral security for such a purpose, the creditor is, in equity, entitled to have it applied in satisfaction of the debt" (See, also, *Moses agt. Murgatroyd*, 1 Johns. Ch., 119; *Homer agt. Savings Bank of New Haven*, 7 Conn., 478).

(b) In the case at bar, what is called the security, was not given by the principal debtor, the Atlantic De Laine Company, but by Edwin Hoyt, who was, personally, a stranger to the transaction between that company and the plaintiffs.

(c) The security (so called) was not given for the better protection of the plaintiffs' claim, but to indemnify Hoyt, Spragues & Co. against any loss on a final accounting with the Atlantic De Laine Company.

(d) The indemnity given by Hoyt to his firm, raised no trust in favor of the plaintiffs. The firm might at any time have released Hoyt from his undertaking, without thereby incurring any liability to the plaintiffs.

(e) If the theory of the plaintiffs is correct, then the purpose of Hoyt's undertaking would be entirely defeated, for

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the plaintiffs have obtained judgment against the sureties and collected a dividend from them, and now seek to strip the sureties of the protection which it was the purpose of Hoyt's contract to furnish.

To allow this the court must, in effect, decide that a surety cannot lawfully take indemnity against his risk, and has no rights that the creditor of his principal is bound to respect. The plaintiffs seem to proceed on the theory that they are, for some reason, to have a preference over all other creditors of Hoyt and his firm. In fact, the general creditors of Hoyt, Spragues & Co. are entitled to receive whatever may be due from Hoyt's estate under this guaranty, and thus to be made good for their loss of the sums paid by the firm to the plaintiffs under the contract of suretyship.

III. When the court gave the plaintiffs leave to amend, it meant that they might make their complaint good, if they could do so. The plaintiffs seem to think there can be but one demurrer in an action, and that the addition of a few immaterial words to their complaint, makes an *amended complaint* that must be answered. Their so-called amended complaint is no better than the other.

IV. The demurrer should be sustained and the complaint dismissed.

Tracy, Olmstead & Tracy, for plaintiffs.

BARRETT, J. — (1) Hoyt's guaranty was to secure an "*ascertained*" balance. Such balance has not yet been ascertained nor can it be in this suit. The reason is obvious. The United States court in bankruptcy has jurisdiction, and is now administering the estate, of The Atlantic De Laine Company. There is no charge of fraud or negligence against the bankruptcy trustee, and it is only when "*all the property*" of this company shall "have been applied in payment of its debts" that, within the terms of the guaranty, the balance becomes "*ascertained*."

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(2) But were the balance ascertained, the action would not lie. Hoyt was, in no just sense, a principal. The only principal was The Atlantic De Laine Company. Hoyt, Sprague & Co. were sureties. If the company had furnished the firm with security, the familiar rule contended for by the plaintiffs would be applicable. But a private arrangement as to the liability *of the sureties between themselves* comes neither within the rule nor the principle upon which it rests. Nothing was set apart by the principal (nor even by Hoyt) upon which a trust could be impressed; and clearly Hoyt's agreement with his firm was not intended to provide for the payment or protection of the plaintiffs' claim nor to increase the security.

(3) So far as the complaint rests upon the judgment against Hoyt, Spragues & Co., and the execution returned unsatisfied, the cause of action is vested in the receiver.

There must be judgment for the defendants, with costs.

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SUPREME COURT.

HUMPHREY H. SWIFT *et al.* agt. FREDERICK H. C. TROSS *et al.*

Appearance — what is special and what general — Charter-party, executed by one not the owner of the vessel, but who had chartered her from the owner — liability for damages for breach of covenant.

The defendants executed a charter-party to plaintiffs, which contained an agreement that the vessel was seaworthy. The defendants were not the owners of the vessel, but had chartered her from the owners:

Held, that for damages resulting from a breach of such covenant or agreement the defendants are liable to the plaintiffs.

The fact that the plaintiffs knew that the defendants had chartered the vessel from the owners does not alter the status of the parties or release the defendants from the obligations which, by their charter-party, they voluntarily assumed.

Although the charter-party executed by the defendants states that the defendants' contract was a recharter, it is not merely an equitable assignment of the first, but it is an independent contract; and while it may have referred to the source of the defendants' right to make such a contract, and to their special title to the use of the vessel, the defendants cannot avoid their liability for that reason upon a failure to fulfill the covenants and conditions of their contract.

The fact that the plaintiffs have brought an action against the owner of the vessel to recover the same damages which form the subject of this action, without also alleging that such an action had been prosecuted to judgment against the owner, and that the judgment had been paid, is not a good defense.

Until the alleged damages have been received from, or paid by, the owner, it is no defense to this case that an action has been commenced against him.

But a non-resident defendant, after attachment and service by publication, cannot specially appear to contest the liability on his part asserted by the plaintiff, and to claim that the court has no jurisdiction over and above the value of the property attached. In other words, he cannot, on an alleged special appearance, obtain all the advantages of contesting

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his entire indebtedness which would follow from a general appearance, and yet avoid the disadvantages resulting from such appearance.

Where a non-resident defendant does not appear, after service by publication, and no property has been attached, the court acquires no jurisdiction, and where property has been attached and the non-resident defendant does not appear, the proceeding is effectual and binding merely as a proceeding *in rem*, and is regarded as having no operation beyond the disposition of the property or some interest therein.

Special Term, February, 1878.

THIS action was brought for the recovery of damages for breach of the covenant in a charter-party of the brig "Mary A. Rich," executed by the defendants to the plaintiffs. The defendants, after attachment and service by publication, appeared (as they claimed) specially for the purpose of defending the property attached.

The defendants set up, among other defenses :

1. That they were not the owners of the brig, and that they had chartered her from the owners, and claimed that the owners, and not they, were liable.

2. That the plaintiffs had commenced an action against the owners of the brig on substantially the same statement of facts, and claimed that the election to sue the owners of the brig was a bar to this action.

3. That they were non-residents of the state of New York, and that the summons had not been personally served on them, and claimed that the court only acquired jurisdiction so far as the property attached was concerned, and no further.

Subsequently one of the defendants was personally served, and he, claiming that it was another action, served an answer, setting up, among other defenses, the first two above mentioned.

To all these defenses the plaintiffs demurred.

George H. Forster, for plaintiffs.

Chas. M. Da Costa, for defendants.

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LAWRENCE, J. — I am of the opinion that the demurrers to the answers of the defendants should be sustained: 1. The charter-party executed by the defendants to the plaintiffs was a distinct and separate contract between them, and not connected with the charter-party entered into between the defendants and the master, on the part of the owners of the vessel. The former contract contained an agreement that the vessel was seaworthy, and for damages resulting from a breach of such covenant or agreement the defendants are liable to the plaintiffs. I utterly fail to see how the fact that the plaintiffs knew that the defendants had chartered the vessel from the owners alters the status of the parties or releases the defendants from the obligations which, by their charter-party, they voluntarily assumed. It is said, by the learned counsel for the defendants, that the express agreement in the charter-party which is the basis of this action is simply an expression of that which the law would otherwise imply. This is true, but how does that fact alter the rights of the parties? If nothing had been expressed in the charter-party in reference to the seaworthiness of the vessel, would not the defendants have been liable upon their implied agreement? Nor can I assent to the position that, because the charter-party executed by the defendants states that the defendants' contract was a recharter, that the second charter-party was but an equitable assignment of the first. The second was an independent contract, and while it may have referred to the source of the defendants' right to make such a contract, and to their special title to the use of the vessel, the defendants cannot avoid their liability for that reason upon a failure to fulfill the covenants and conditions of their contract. 2. Nor do I regard the fact that the plaintiffs have brought an action against the owner of the vessel to recover the same damages which form the subject of this action as a good defense in this case. If it had been alleged that such an action had been prosecuted to judgment against the owner, and that the judgment had been paid, a different feature would be presented. It is possible

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that a supplementary answer setting forth such payment might then be allowed. But until the alleged damages have been received from or paid by the owner, the fact that an action has been commenced against him does not appear to constitute a defense to this case. 3. The case of *Pennoyer agt. Neff*, recently decided by the supreme court of the United States, does not affect this case. Here the parties have appeared. It is contended that they have appeared specially, and that they have, therefore, the right to insist that no personal judgment can be rendered against them, beyond the value of the property which has been attached. The cases cited by the defendants' counsel certainly do hold that where a non-resident defendant does not appear, after service by publication, and no property has been attached, the court acquires no jurisdiction, and that where property has been attached, and the non-resident defendant does not appear, the proceeding is effectual and binding merely as a proceeding *in rem*, and is regarded as having no operation beyond the disposition of the property or some interest therein (*See opinion of justice FIELD, in Pennoyer agt. Neff, and cases cited*).

None of these cases, however, hold that the defendants can specially appear to contest the liability on their part asserted by the plaintiff, and to claim that the court has no jurisdiction over and above the value of the property attached. If the defendants had not appeared and answered, the position of the defendants would be tenable, but they cannot, on an alleged special appearance, obtain all the advantages of contesting their entire indebtedness which would follow from a general appearance, and yet avoid the disadvantages resulting from such appearance.

There should be judgment for the plaintiffs on the demurrer, with costs.

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N. Y. COMMON PLEAS.

MARY ELIZA HYNES agt. KATE McDERMOTT.

Examination of parties before trial—secs. 870 and 872 Code of Civil Procedure—sufficiency of affidavit on application for order.

The examination of an adverse party before trial, provided for by sections 870 and 872 of the Code of Civil Procedure, is not a mere substitute for the former remedy by bill of discovery.

The provisions of these sections are far more than that. They provide a simple plan of perpetuating testimony, and were intended as a substitute for article 5, chapter 7, title 3, part 3, Revised Statutes (2 R. S., 398, 399). Section 872 embraces the equitable remedy of perpetuating testimony, as well as the equitable remedy of a bill of discovery, and under it a defendant is entitled to obtain the testimony of a plaintiff, as a means of repelling his action.

In order to procure the examination of an adverse party before trial, under sections 870 and 872 of the Code of Civil Procedure, it is not necessary that the applicant should present to the court an affidavit embodying all or the major part of the allegations that were requisite in a bill of discovery.

It is sufficient under these sections to state in the affidavit that the testimony of the party sought to be examined is *material and necessary*, and without any further statement it would seem to be imperative upon the court to grant the order; it is not necessary to state the very *facts and circumstances*, which the rules of equity pleading would have required to be stated in a bill of discovery. (DALY, Ch. J., *dissenting*.) (See *Phœnix* agt. *Dupuy*, 53 How., 158, and *Shepmes* agt. *Bousson*, 52 *id.*, 401.) Section 873 declares that the judge must grant the order when an affidavit is presented to him *setting forth* certain allegations. The applicant is not bound "*to make it appear*" to the judge, that is to convince him, by a mass of evidence, positive, direct or circumstantial, that those allegations are founded upon fact. The law requires the judge to take the applicant's word for them.

The plaintiff brought her action of ejectment. The defendants denied her right to the land in suit. The plaintiff alleged that she was the widow of the man from whom the defendants had inherited the property in controversy. The defendants had never heard that their brother,

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whose heirs they were, had ever been married. After issue joined, they sought to examine the plaintiff as a party before trial.

Held, that this was a proper case for such an examination.

General Term, November, 1877.

VAN HOESSEN J. — Upon the application of some of the defendants, judge VAN BRUNT made an order, under section 872 of the Code of Civil Procedure, for the examination of Mary Eliza Hynes, one of the plaintiffs, as a party before trial. That order was vacated and set aside by judge J. F. DALY, who held that the Code of Civil Procedure had not changed the law as it was established by sections 389, 390 and 391 of the old Code of Procedure. An appeal was taken from the order of judge J. F. DALY, and the question presented to us is, whether, in order to procure the examination of the adverse party before trial, under sections 870 and 872 of the Code of Civil Procedure, the applicant must present to the court an affidavit embodying all or the major part of the allegations that were requisite and necessary in a bill of discovery?

It was held by the general term of this court in *Phœnix* agt. *Dupuy* (53 *How.*, 158), and by the special term (judge ROBINSON) in *Schepmoes* agt. *Bousson* (53 *How.*, 401), that sections 389, 390 and 391 of the Code of Procedure, were a mere substitute for the bill of discovery in the old chancery practice; and that an examination of a party to an action could not be had by his adversary, until the latter had shown, by affidavit, the very facts which the rules of equity pleading would have required him to state in a bill of discovery. Those decisions are binding upon the court, and I do not question them. The court of appeals alone can pass upon their correctness.

We have now before us a new statute, the provisions of which are very different from the language of the former Code. It cannot be truly said that sections 870 and 872 of the Code of Civil Procedure are a mere substitute for the bill of discovery. They are far more than that. They provide a

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simple plan of perpetuating testimony, and were intended, doubtless, as a substitute for article 5, chapter 7, title 3, part 3 Revised Statutes (2 *R. S.*, 398, 399). As everybody knows, those provisions of the Revised Statutes were intended to save the suitors the trouble and expense of filing a bill in equity to perpetuate testimony. It is not worth while to consume time and space by reciting what averments were necessary in a bill to perpetuate testimony. Volume 2, Barbour's Chancery Practice, marginal pages 137-145, and volume 2, Story's Equity Jurisprudence, sections 1506-1512, are full upon that subject. I think it necessary to call attention to one matter, however, which will occasion trouble to those who believe that the rules relating to bills of discovery are still in force: "A bill to perpetuate testimony will lie in many cases where a bill of discovery would not lie. Thus, in cases involving a penalty or forfeiture of a public nature, a bill of discovery would not lie at all; and in cases which involve forfeitures or penalties of a private nature, it will not lie, unless the party entitled to the benefit of the penalty or forfeiture, waives it. But no such objection exists in regard to a bill to perpetuate testimony; for the latter will lie, not only in cases of a private penalty or forfeiture, without waiving it where it may be waived, as in cases of waste or of the forfeiture of a lease, but also in cases of public penalties, such as for the forgery of a deed, or for a fraudulent loss at sea" (2 *Story's Equity Jurisprudence*, sec. 1509).

There is a further distinction. A bill to perpetuate testimony will lie against a *bona fide* purchaser without notice, though a bill of discovery is not maintainable against him (2 *Story's Eq. Jur.*, sec. 1510). Now, as sections 870 and 872 are a substitute for the bill to perpetuate testimony quite as much as for the bill of discovery, and as there is just as much authority for applying the doctrines of the bill to perpetuate testimony as there is for applying the doctrines relating to bills of discovery, I should like to know which of these two irreconcilable methods of procedure is to control the other.

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Furthermore, if it be right to insist that an affidavit of the party seeking to examine his adversary shall contain all the allegations of a bill of discovery, why ought it not also to contain all the allegations requisite in a bill to perpetuate testimony? Again, the language of sections 872 and 873 very distinctly prescribes what the affidavit shall state. It specifies what the affidavit shall *set forth*. It is to be observed that the section does not provide that the judge shall grant an order for the examination "*when it shall appear* by affidavit that sufficient grounds exist therefor" (*see secs. 181, 220, and 229, Code of Procedure*), where that language has been employed, the courts having uniformly construed it as giving them power to require a full and detailed statement of the facts by which it is made to appear that the applicant is entitled to the order he asks for. Section 873 declares that the judge must grant the order when an affidavit is presented to him *setting forth* certain allegations. The applicant is not bound "*to make it appear*" to the judge, that is to convince him, by a mass of evidence, positive, direct or circumstantial, that these allegations are founded upon fact. The law requires the judge to take the applicant's word for them.

Where an attachment is applied for, the plaintiff must show by affidavit, *to the satisfaction of the judge*, the facts entitling him to it (*Code of Civil Procedure, sec. 636*).

Section 557, which relates to orders of arrest, and section 607, which relates to injunctions, are, in substance, the same as sections 181 and 219 of the Code of Procedure, and were doubtless intended to be construed in the same way. It was known that affidavits setting out in detail the facts making an arrest or an injunction proper, would, in all cases, be required by the judge. But, as I have already pointed out, the language of sections 872 and 873 is very different. The very change of words carries with it a strong presumption that the legislature did not intend that the same kind and the same amount of proof should be required as on an application for a provisional remedy. In language so plain that it cannot

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be misunderstood, the Code prescribes what the affidavit shall contain, and I know of no authority except the law-making power which can lawfully require any extra allegations (*Glenny agt. Stedwell*, 64 N. Y., 128).

I have already said that section 872 was a substitute for that portion of the Revised Statutes entitled, Of Proceedings to Perpetuate Testimony. The language of the Revised Statutes is not so clear and unmistakable as the language of section 872, and yet no one of the eminent judges who passed upon article 5, ever thought it necessary to tack it to the chancery rules relating to bills to perpetuate testimony. In *Jackson agt. Perkins* (2 Wend., 308), the supreme court gave the statute a liberal construction. And in *The Matter of Kip* (1 Paige R., 601), the affidavit stated that certain actions of ejectment were pending, and that the testimony of Isaac L. Kip was material and necessary in the prosecution of the suits. There was no statement in the affidavit of any fact which made it necessary or proper for a court of equity to lend its aid, and, of course, as a bill to perpetuate testimony the affidavit would have been fatally defective, but, yet, chancellor WALWORTH seems to have had no doubt that the affidavit was sufficient.

In his opinion, the chancellor makes some observations, which apply as completely to section 872 of the Code of Civil Procedure as they applied to the statute which the chancellor was expounding.

"By the act under which these proceedings were instituted, it was the intention of the legislature to give to the master, or other officer, power to take testimony, and to compel the witnesses to give evidence in the same cases and to the same extent that the court would be authorized to compel the witness to testify on the trial of the cause. It does not authorize the examination of a witness who would not be compelled to testify on the trial. The witness is not obliged to criminate himself, or answer any question which he would not be bound to answer if examined in open court. If the testimony is calcu-

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lated to criminate the witness, render him infamous, or to subject him to a forfeiture or penalty, the officer has no right to compel him to testify. So, if the master is satisfied the testimony can have no possible bearing upon the questions which may arise in the cause, he ought not to compel the witness to answer, especially when a reasonable objection is urged by him. The officer must necessarily have some discretion on this subject, and he may require the party, on whose application the examination is made, to explain the nature of the litigation, so far as to enable him to judge whether such applicant is proceeding in good faith to perpetuate testimony, or is, under that pretense, only fishing for testimony to be used against the witness, or for other purposes. On this subject the officer must be permitted to judge, and he is not bound to commit the witness for refusing to answer, if he thinks the question ought not to be answered."

These observations prove conclusively that, in proceedings under the statute, which the chancellor was construing, fishing inquiries are to be stopped by the officer before whom the examination is going on, there being no authority for requiring an affidavit from the applicant, specifying in detail the particular facts which it is sought to prove by the witness (2 *Tillinghast & Shearman Pr.*, 376; *Yates' Pleadings*, p. 82; see 62; *Graham's Practice*, 589; 2 *Phillips on Evidence*, 4th Am. ed., edited by Isaac Edwards).

When the simplicity of our system of practice is considered, there seems to be no necessity for requiring in an affidavit the fullness of averment that was necessary in a bill of discovery. A bill of discovery required a written answer. If the defendant answered at all, he was compelled to answer all the facts stated in the bill, except when he was specially protected from answering.

If he failed to answer, an injunction might be obtained restraining him from prosecuting or from defending the action at law, or the bill might be taken *pro confesso* against him, and then offered, on the trial at law, as an admission on

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his part of all its allegations (*Daniell's Chancery Practice*), or he might be arrested and imprisoned until he answered (*Equity Rule 18, U. S. supreme court*). Before any of these stringent proceedings should be taken, it was right to call upon the complainant to show the utility and the necessity of the discovery which he sought. The answer was not made nor were the interrogatories propounded in the immediate presence of the judge, and there was, therefore, no way in which the defendant could be protected from a fishing inquiry save by the judge seeing to it, in the first instance, that the object of the complainant was legitimate, and that his interrogatories were so framed as to call forth only such information as he had a right to demand. In New York, however, the examination is had under charge of the judge. If the judge performs his duty, a party cannot put a fishing question without being checked by the bench (*Glenny agt. Stedwell, 64 N. Y., 123*). The party under examination may object to any question, the same as upon a trial, and the objection may answer all the purposes of a demurrer to a bill of discovery. In short, in our practice, the main, the interrogative, part of a bill of discovery, and the demurrer, plea or answer thereto, are not in writing, but are oral, and are presented by the parties in open court. There is no need, therefore, of precautions against improper and fishing examinations.

It is said that the examination of parties before trial tends to promote abuses. To that I can make no better answer than is found in the opinion of the court of appeals, in *Glenny agt. Stedwell* (64 N. Y., 123). "It is not a sound argument which reasons against the existence of a right from the possibility of the abuse of it."

It will be seen that the foregoing observations are not limited to the case under review.

But, even if I am in error in the views I have expressed, I think the affidavit of Mr. Balestier sufficient to sustain judge VAN BRUNT's order. The plaintiff brought her action of

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ejectionment. The defendants denied her right to the land in suit. The plaintiff alleged that she was the widow of the man from whom the defendants had inherited the property in controversy. The defendants had never heard that their brother, whose heirs they were, had ever been married. After issue joined, they sought to examine the plaintiff as a party before trial. If there ever was a case in which such an examination ought to have been had, it seems to me this is the very one. In what way were they to discover when and where the plaintiff, of whose history they were utterly ignorant, and of whose existence they had just become aware, married their brother? How could they prepare for trial? What reason, except the extremely technical one given by judge DALY in setting aside judge VAN BRUNT's order, was there for preventing the examination of the plaintiff as to the issues raised by the pleadings? In lord HARDWICKE's time, just such an examination could have been had in chancery, for in *Metcalf v. Hervey* (1 Vesey, Sen., 248) the great chancellor said :

"The question comes to this, whether any person in possession of an estate as tenant, or otherwise, may not bring a bill to discover the title of a person bringing ejectionment against him, to have it set out and seen ; and he was of opinion he might, to enable him to make a defense in ejectionment." I am aware that that case has been frequently disapproved, but never, so far as I know, by the court of appeals.

Again, section 872 embraces, as I have said, the equitable remedy of perpetuating testimony, as well as the equitable remedy of a bill of discovery ; and a bill to perpetuate testimony lay not only to obtain proof in support of the plaintiff's action, but also to obtain proof of matters of defense to repel it (2 *Story's Equity*, 1509, citing *Earl of Suffolk v. Green*, 1 *Atk.*, 450).

I think the defendants were entitled, therefore, to obtain the testimony of the plaintiff, as a means of repelling her action.

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I am in favor of reversing the order of judge DALY, with costs and disbursements.

LARREMORE, J. — Having concurred in the decision (*Phœnix* agt. *Dupuy*, 53 *How.*, 158), I have sought to apply the same ruling in this case. But a marked distinction is found in the phraseology of the statute authorizing an examination of a party before trial.

The case first mentioned was under sections 389–395 of the old Code, the proceeding under which is in the nature of the former remedy by bill of discovery (*Glenney* agt. *Stedwell*, 64 *N. Y.*, 174).

Section 391, of the old Code, provided that the examination of a party, instead of being had at the trial might be had at any time before the trial, at the option of the party. Under this statute, the examination has, in some instances, been held to be a statutory right, and beyond judicial discretion.

But this application is under sections 870–873 of the Code of Civil Procedure, which appear to be mandatory in terms, and to have been adopted to meet and remove a variance of opinion upon the construction of the former statute.

Whatever may be the effect of Rule 89, of the supreme court, it was not in operation when this application was made, and the defendants stand upon the law in force in September, 1877.

It is unnecessary to consider what limitations might be imposed by the court upon such an examination, but defendants' right to the order for it, seems to be authorized by law, and a matter of right upon the papers presented.

DALY, C. J. (*dissenting*). — The main point relied upon for the reversal of this order is, that it was sufficient, under the new Code, simply to state, in the affidavit, that the testimony of the plaintiff was material and necessary for the defense of the action, "which, without any further statement, made

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it imperative upon the court to grant the order," is disposed of by referring to Rule 89, adopted at the convention of judges, last October, which declares that the affidavit "shall *specify the facts and circumstances which show*, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary."

After this general statement, it is averred that the examination is material and necessary for many reasons. The reasons given are, that the plaintiff, Mary E. Hynes, claims to be the widow of W. R. Hynes; that the marriage, if any, was consummated in England, where Hynes and she resided; that the defendants did not know of the existence of the plaintiff's or of Hynes' connection with them until after his death; and that there are many facts, occurrences and circumstances, within the knowledge of the plaintiff, Mary E. Hynes, and which, in the nature of things, the defendants could not have any knowledge of, necessary and material for the defendants to inquire into for the purpose of properly preparing their defense in the action, *many of them facts*, which they can learn from no other source. Not a single fact, however, is stated, nor any indication of the nature or materiality of the evidence sought to be elicited. That this is not, and never was sufficient to compel such an examination, will appear by referring to *Phoenix agt. Dupuy* (53 How., 158), and the authorities there cited.

The order should be affirmed.

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SUPREME COURT.

FREDERICK A. CONKLING agt. THE SECOR SEWING MACHINE
COMPANY *et al.*

Mortgage by manufacturing corporation — Consent necessary — Pledgor — Pledgee — Sale of property "subject to what may be due upon a mortgage" — action in another state — Injunction when refused.

A stockholder of a corporation knowing of the existence of a mortgage upon its property, caused to be sold under an execution issued by him upon a judgment in his favor against the corporation, all the right, title and interest of the corporation in and to the property covered by the mortgage, "subject to whatever sum might be due upon the property by virtue of the mortgage," and himself purchased on the sale for a trifling sum.

Held, that the purchaser could not dispute the fact of the mortgage nor its validity.

Whether a corporation can itself join in the consent necessary to create a valid mortgage, under chapter 481, Laws of 1871, when the stock upon which its consent is based, has been pledged by it to a creditor as security for a debt, *quære?* Rights of pledgor and pledgee considered.

When an action for the foreclosure of a mortgage, made by a corporation, is pending in *another* state, to which action a judgment creditor of the corporation is a party defendant, who has by his answer, interposed as a defense the invalidity of the mortgage, a court of equity in *this* state will not, upon the same grounds, disclosed in such answer, interfere by injunction at the creditors' instance, to enjoin the holders of the mortgage from prosecuting their action in another state, nor will it affirmatively decree the mortgage to be void. The question must be litigated in the action first brought.

Equity disfavors a multiplicity of suits for the same substantial ends, and when full relief can be had in one action, another for the same object should not be allowed. Reasons for the application of such rules in this case, stated in the opinion.

Special Term, April, 1878.

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THIS is an action by a judgment creditor to set aside, as void, a mortgage made by the defendant corporation, upon the ground that the requisite consent of its stockholders to its creation had not been obtained, and also to restrain the holders of the mortgage from prosecuting an action for its foreclosure pending in the state of Connecticut.

Davis & Whitehead and *Henry E. Davis*, for plaintiff.

Paddock & Cannon and *Franklin A. Paddock*, for defendants.

VAN VORST, *J.*—I do not think it necessary to decide whether the mortgage sought to be canceled is invalid.

An action for its foreclosure is now pending in the courts of the state of Connecticut, and the plaintiff herein is a defendant in that action, and has interposed an answer thereto setting up the invalidity of the mortgage upon the grounds stated in his complaint herein. It may be regarded as a serious question whether the corporation could join in the consent necessary to create a valid mortgage, when a portion of the stock held by it, and upon which its assent is based, has been issued, and pledged to, and was held by a creditor as a security for the payment of a debt.

It may well be claimed that the pledgee is the owner of the stock for the purpose of giving a valid assent to the creation of a mortgage under chapter 481, Laws of 1871. Otherwise his security might be wholly destroyed by the creation of a mortgage upon the corporation property. The legal title to 240 shares of the stock upon which the corporate assent to the mortgage was based was in the plaintiff. He was the owner of it, and would so continue until the debt was paid, and the stock redeemed. It is true that by section 17, chapter 40, Laws of 1848, the person who should pledge his stock may represent the same and vote upon it as a stockholder at *all meetings* of the company; from which it is argued that

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the pledgor may assent to a mortgage, and is the proper person to do so. The question is not free from doubt, but I do not propose to pass upon the validity of the mortgage.

The fact, however, that the existence of the mortgage was known to the plaintiff as early as March, 1875, at a meeting of stockholders called to consider the affairs of the company, and the increase of its capital stock, is not without significance.

Many of the bonds secured by the mortgage had been turned over to creditors; upon others moneys were raised by the corporation, a portion of which was used to reduce the plaintiff's debt against the corporation.

Pending the action in the court in Connecticut for the foreclosure of the mortgage, the injunction which had been issued therein restraining the sale of the property, was so far modified as to allow the mortgaged property to be sold under the plaintiff's execution.

At this time the plaintiff had not answered in that action, and it does not appear that, up to this time, he had challenged the goodness of the mortgage. He had taken no steps to contest it.

On the 4th day of May, 1877, the officer who held the execution in the plaintiff's favor, sold at public auction, after due notice, all the right, title and interest of the corporation defendant, in and to the property covered by the mortgage.

The same was sold "subject to whatever sum might be due upon said property by virtue of the mortgage." This must be regarded as the plaintiff's act. It was a proceeding on his judgment. The property was purchased by the plaintiff for the sum of seven dollars and fifty cents, on a sale under an execution in his favor. I think if it was intended, at the time the property was sold, to dispute the validity of the mortgage, the plaintiff, who was present at the sale with his counsel, should then have announced such intention. If the mortgage itself was questioned, it should have been so stated. The statement that the sale was made subject to what might

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be due, raises an implication that there was or might be some thing due.

Mr. Beers, the counsel for the plaintiff, present at the sale, says "it was not sold subject to the face of the mortgage, which would be for the sum of \$100,000; that it was sold and was, at the time of the sale stated, subject to whatever sum might be due on the mortgage; the amount at the time was unknown." In this there is no suggestion that the mortgage was claimed to be invalid.

Had the validity of the mortgage itself been questioned; had it been stated, as I think it should have been, that it was claimed to be invalid, and would be wholly resisted, the property would presumably have brought a larger price.

According to the inventory, a large amount of machinery and other personal property was sold for a trifle, subject only, as aforesaid. The fact that the property brought no greater price, leads to the conclusion that it must have been believed at the sale that some considerable sum was due and collectible on the mortgage.

The officer who made the sale, executed and delivered to the plaintiff, on his purchase, a bill of sale, in which it is expressed that the sale was made "subject to whatever sum may be due upon a mortgage of the said property to trustees for the benefit of the bondholders."

There are cases which hold that under such a qualified purchase, the vendee cannot dispute the fact of the mortgage or its validity. *Hardin agt. Hyde* (40 *N. Y.*, 435) expresses that view (*Freeman agt. Auld*, 44 *N. Y.*, 50). There are other decisions in the same direction, but I do not consider it important to press this point further.

Carpenter agt. Simmons (1 *Robt.*, 360) is supposed to hold a contrary doctrine, but I do not think it does. *MONELL, J.*, says (*p.* 375) "He did not purchase subject to the mortgage." The bill of sale in this case, I think, indicates that the plaintiff so purchased. Without deciding that the plaintiff is absolutely estopped, in every event, and in all courts, from

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questioning the validity of the mortgage, I do not think that this action discloses proper grounds for equitable relief in this court.

In the action pending in a sister state for the foreclosure of the mortgage, the injunction in which was modified to allow the sale under the plaintiff's judgment, the question raised by his answer, interposed to that action, may properly be litigated by the plaintiff. It is, however, for that court to decide what may be there litigated. I do not think that the prosecution of that suit can be interfered with by the judgment of this court; nor do I think that the defendant should be any longer restrained by injunction from prosecuting their suit in Connecticut.

I do not see how we can well or properly interfere with that litigation of which the Connecticut court has acquired jurisdiction. And an adjudication in Connecticut adverse to the legality of the mortgage, all the parties in interest being before the court, would be final and conclusive, and a judgment there against the validity of the mortgage would be an answer to any suit or proceeding commenced there or elsewhere to enforce the mortgage. Until an adjudication be had in that suit, the property cannot be removed or interfered with in opposition to the plaintiff's rights. The injunction in the foreclosure suit and the plaintiff's purchase, under his execution, are security against that.

I cannot see, therefore, that this action is at all necessary for the plaintiff's thorough protection. Equity disfavors a multiplicity of suits for the same substantial ends. If full relief can be had in one suit no other should be allowed (*Vanderbilt agt. Vanderbilt*, 54 How. Pr. R., 250).

While the pendency of the action in the courts of Connecticut may not in itself be a complete defense to a suit here, yet it affords a reason why a court of equity should not interfere by injunction, if complete redress may be had in the suit first instituted.

Nor, for the reasons above indicated, is the plaintiff entitled

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to an affirmative judgment canceling the mortgage as void. The plaintiff's claim for such a judgment is founded upon his purchase made under his own execution. He purchased subject to what might be found due upon the mortgage.

The trustees and mortgagees, through their counsel, were present when the property was exposed for sale, and sold under such conditions and qualifications.

They had good reason to suppose, under such condition and qualification, that subsequent inquiry and scrutiny with respect to the mortgage would be, not as to its validity, but as to the amount due thereon, which, as Mr. Beers states, was not then known.

The plaintiff's counsel urges that he is entitled to be reinstated as to his lien on the corporate property, which he held under his attachment, which was, by arrangement, given up before the mortgage was made. I do not see how, in this suit, he can be so reinstated. But his position as a purchaser of the property for the price named gives him advantages greater than those he had before.

He is now the absolute owner of the property, subject to what may be due on the mortgage, for the price of seven dollars and fifty cents. He has his claim unsatisfied against the corporation — and should we here grant a judgment canceling the mortgage wholly, he would have the property and his claim in addition. This is much more than being restored to his lien under the attachment.

I am satisfied that the Connecticut action, in which the plaintiff intervened to procure an order to allow the sale under his execution, is the one in which the plaintiff should urge his objections to the validity of the mortgage, and that court, I am persuaded, will not be slow to give a just and equitable judgment in the premises.

I cannot think the plaintiff is entitled to the relief asked, and conclude that his complaint must be dismissed, with costs.

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SUPREME COURT

WILLIAM H. TAYLOR and WILLIAM A. DUNPHY, trustees, &c.,
agt. THE ATLANTIC AND GREAT WESTERN RAILWAY COM-
PANY and others.*

Judgment of court of another state, when not conclusive upon courts of this state, or parties — Railroad mortgage bonds — power of court to change the terms of.

A judgment of a court of another state is only conclusive upon parties where it is a definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in this state.

The N. G. and W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. An agreement was entered into between M. and a majority of the bondholders under the Ohio mortgage and T. and D. extending the time of payment of the Ohio mortgage for three years, and changing the interest during such extended term from currency to gold. This agreement was not to take effect until confirmed by the courts in each of the three states. It has been confirmed by the court in Ohio, and is now presented to this court and a confirmatory order asked for upon the basis of the Ohio order, which application is opposed by some of the second mortgage bondholders.

Held, that the agreement itself contemplates a distinct and independent approval by the courts of each one of the states in which actions are pending for the foreclosure of the mortgage and the sale of the company's property. A distinct and separate approval was what was in terms required, according to the conclusions reached as to the propriety of the agreement by the courts respectively of these different states; and that rendered an examination of the facts, upon which the

* This and the two following cases are to be read together.

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application has been made, necessary for the purpose of determining whether such approval ought to be given.

Every bondholder is equally entitled by the agreement made with him, and with the trustees for his benefit, to be protected in all the advantages legally secured by it. And for that reason the courts cannot disregard the principle protecting him, because the amount due to him, and the extent to which he may be entitled to participate in the advantages of the security, may be, comparatively speaking, not very significant. It is enough that a material right may be prejudiced, and the party deprived of the full advantage of his contract and security to require that the court shall not interpose to his manifest injury.

The bondholders secured by the second mortgage, by virtue of that instrument, have become, both legally and equitably, entitled to have the proceeds of the property applied upon their debt after paying off the first incumbrances. This court has no power to sanction any change in the effect of the terms of that instrument.

It would be grossly unjust to the second mortgage bondholders to change the payments of interest in the first mortgage bonds from currency to gold, and the court has no authority which would permit it to take that difference for a period of three years from the holders of the second mortgage bonds and give it to the more fortunate owners of the first, against the objections of those resisting the proceeding.

Where the validity of the contract was also made dependent upon the approval of the trustees under the first mortgage, and one of them had since resigned, and the other had simply placed himself under the advice and direction of the court :

Held, that this was not what was provided for by the terms of the agreement. The judgment of the trustee upon the subject was required, for his approval could not be given or withheld without the exercise of judgment. Nor can the court dispense with the observance of that requirement, because one of the persons named afterwards resigned his office.

Erie Special Term, August, 1877.

THE Atlantic and Great Western Railway Company was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to one Meyer, as trustee, and another and subsequent mortgage upon all the property in the three states was executed to Taylor and Dunphy, as trustees, who brought suit in each of the three states to foreclose the same.

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An agreement was entered into between Meyer and a majority of the bondholders under the Ohio mortgage, and Taylor and Dunphy extending the time of payment of the Ohio mortgage for three years and changing the interest during such extended term from currency to gold. This agreement expressly provided that it was not to take effect until it was confirmed by the courts in each of the three states. The parties in interest presented it for confirmation to the court in Ohio, and it was there confirmed. It was presented to the court in New York, and a confirmatory order was asked upon the basis of the Ohio order. The application was opposed by some of the second mortgage bondholders.

W. W. MacFarland, for plaintiffs.

Blatchford, Seward, Griswold & Da Costa, for defendant
The Banque Franco-Egyptienne.

Charles H. Tweed, for defendant Bischoffsheim.

DANIELS, J.—The application in this case is for the confirmation of an agreement made with the holders of certain first mortgage bonds for the extension of the period for their payment for the term of three years from the 1st day of October, 1876. To induce the persons holding the bonds to agree to the extension it has been proposed to pay the interest accruing upon them at the rate of seven per cent in quarterly gold payments instead of seven per cent in currency according to their terms. This has been objected to by a small per centage of the holders of these bonds, but as they very obviously could not be injured by the increase of their interest by changing the payments from currency into the more expensive and valuable medium of gold their objection cannot be sustained because of any apprehended injury probably resulting to them by reason of the change. Still if they have a legal right to succeed upon the objection it should, of

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course, be permitted to prevail. But without deciding that point now, it may be as well to consider others appearing to be insurmountable in their character.

The application for the confirmation and approval of the agreement has been made by the plaintiffs, as trustees of the second mortgage bondholders, for the reason that it has been considered by them as specially advantageous to their interests on account of the present depreciated condition of the mortgaged property; and if all the bondholders secured by the second mortgage assented to the arrangement a very serious obstacle in the way of its success would be out of the case. But they do not, and among those opposing it is the defendant, the Banque Franco-Egyptienne, as the holder of such bonds to the amount of \$1,800,000. It is also opposed by others holding small amounts of the bonds. Notwithstanding this resistance the court of common pleas of Summit county, in the state of Ohio, has confirmed the agreement; and the present application has, in great part, been placed upon the basis of that action; not, however, because it should be adopted as conclusive upon the courts of this state, for, as a mere interlocutory order, it could not be attended with any such effect (*Brinkley agt. Brinkley*, 50 *N. Y.*, 185); but more particularly because, as a matter of comity, the same order should be made in the courts of this state as the court in the state of Ohio had deemed to be proper by way of disposing of a similar application; and there would be a decided inclination to yield assent to this position if that could consistently be allowed under the views taken of the merits of the application. But that cannot be done, because the agreement itself contemplates a distinct and independent approval by the courts of each one of the states in which actions are pending for the foreclosure of the mortgage and the sale of the company's property. What it was agreed should be done in this respect to render the agreement operative was, that it should first receive the approval of the court in Ohio, and also of the courts in the states of Pennsylvania and New York; and that

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was an entirely different thing from the approval of one court followed formally by the determination of the others. A distinct and separate approval was, what was in terms required, according to the conclusion reached, as to the propriety of the agreement by the courts respectively of these different states. And that rendered an examination of the facts, upon which the application has been made, necessary for the purpose of determining whether such approval ought to be given.

As it has already been intimated the evidence furnished on the hearing of the application clearly supports the conclusion that the incumbrances upon the property of the company very much exceeds its value. A large loss must be, in any event, sustained by the holders of the bonds secured by the second mortgage; and by virtue of that instrument they have become both legally and equitably entitled to have the proceeds of the property applied upon their debt after paying off the first incumbrances. That is the plain effect of the instrument made for the security of their demands, and this court has no power to sanction any change in the effect of its terms. By changing the payments of interest from currency to gold such a change would clearly be made. It would increase the amount of the first incumbrance by the increased value of gold over currency, and correspondingly diminish the security of the holders of the second mortgage bonds. That would be no trifling sum of money, for the amount of the bonds secured by the first mortgage and now outstanding against the company is the sum of \$2,416,300. The court has no authority which would permit it to take that difference, for a period of three years, from the holders of the second mortgage bonds and give it to the more fortunate owners of the first, against the objections of those resisting the proceeding. The same principle which would sanction a small increase of the prior incumbrance would sustain one which might prove entirely destructive to those designed to be protected by the succeeding incumbrance; and if the court had the power over the agreement of the parties to change it in any material

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respect it could entirely destroy its value. The point involved is one of principle solely, for if the power exists it can be limited in its application only by the subject to be affected by it. Every bondholder is equally entitled, by the agreement made with him and with the trustees for his benefit, to be protected in all the advantages legally secured by it, and for that reason the courts cannot disregard the principle protecting him, because the amount due to him and the extent to which he may be entitled to participate in the advantages of the security may be, comparatively speaking, not very significant. It is enough that a material right may be prejudiced and the party deprived of the full advantage of his contract and security, to require that the court shall not interpose to his manifest injury; and such a right has been clearly shown in this case.

The validity of the contract was also made dependent upon the approval of the trustees under the first mortgage. One of them has since resigned, and the other has simply placed himself under the advice and direction of the court. This was not what was provided for by the terms of the agreement. His judgment upon the subject was required, for his approval could not be given or withheld without the exercise of judgment. By his first answer he evaded the performance of this duty, and in terms submitted the entire matter to the consideration of the court, and asked its advice and direction; and the second, though more elaborate, was not designed to be more extended in that respect, for in that he stated that he had "abstained from executing the said contract and from promoting or forwarding it, and has limited himself to submitting the entire question to the court for direction, and is prepared to act as the court may instruct him." He further added his opinion, "that if the ultimate security of the bonds represented by him as trustee will be in no way impaired, weakened or prejudiced by the forbearance contemplated by the said contract, he deems the arrangement embodied therein to be generally beneficial to the interest of his *cestuis que*

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trust, and to be as advantageous an adjustment of existing complications as can reasonably be hoped for." This was not added for the purpose of supplying the approval mentioned in the agreement, but simply by way of showing that he had discovered no reason why it should not be given. And whether that was advisable or not was left entirely to the direction of the court. Upon this subject the court was entitled to have his action for its guidance, and was not required to determine what was proper in the premises, both for itself and the trustee. The agreement, in terms, also required the approval of both the trustees in the preceding mortgage; and this court cannot dispense with the observance of that requirement because one of the persons named afterwards resigned his office. The judgment of the two individuals was stipulated for, and that of Schuchardt has never in any form been obtained. Then it has been shown that the remaining trustee was enjoined by the order of this court from approving of the agreement. And while the court in Ohio was not restrained in its action by that proceeding, this court certainly cannot with the least propriety sanction a violation of its own prohibition. Both proceedings are of an equitable description; and while courts of law have refused to be bound by the injunctions of the courts of equity, the tribunal itself which has issued the process has never knowingly allowed its restraints to be disregarded.

It appears that the property of the corporation has for a series of years been in the hands of a receiver, who has continued to operate it under the direction of the courts. During that time his expenses have exceeded his receipts by nearly the sum of \$600,000. And it has been shown that the earnings at this time do not exceed the expenses of operating the road. For that reason, it is manifest that the gold interest could not be paid out of the earnings of the property, even if the court should add its approval to the agreement. Since it was to have gone into effect, nearly one year's interest has matured, and no fund whatever has accrued, or been created,

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out of which payment could be made. To sanction an extension of the credit upon the terms offered would be of no advantage to any one, because the funds required to perform the contract cannot be expected to be obtained.

No sound reason seems to exist for the approval of this agreement by the court. The only plausible one is that sustained by the action of the court in Ohio, and that should not be followed, because of the objections already mentioned; and, besides that, the order there made is still the subject of contest by way of an appeal. While that is undetermined, it cannot be followed as an adjudication controlling the rights and interests of the parties. For that, as well as the other reasons assigned, the approval of the contract by this court ought to be withheld, and the motion made on behalf of the plaintiffs denied.

Pending these proceedings Kohn Reinach, as owner of certain of the bonds issued under the Ohio mortgage, commenced a suit in New York, on behalf of himself and of all the other minority bondholders who dissented from the agreement, against Meyer, as trustee, and one Smithers, as attorney for the assenting bondholders, to restrain them from carrying the extension agreement into effect, and from presenting the same for confirmation to the Ohio court. An injunction was granted by Mr. justice BRADY. The defendants moved to dissolve (*See Reinach agt. Meyer and others, post 283*).

Reinach agt. Meyer.

SUPREME COURT.

KOHN REINACH agt. LOUIS H. MEYER and others.

Injunction restraining trustee of mortgage bondholders from carrying into effect an agreement whereby the terms of mortgage as to time and rate of interest were changed—when should be continued pendente lite.

Where an injunction was granted restraining a trustee of certain mortgage bondholders from carrying into effect an agreement whereby the terms of the mortgage as to time of payment and rate of interest were changed, and since the motion to dissolve the injunction was made an application has been made to another justice for the confirmation of the agreement, and such application has been refused by him, the injunction should be continued.

The objection that the application was made, in an action in which the first mortgage bondholders were not made parties, is of no force. If it would not be equitable to the second mortgage bondholders to confirm the agreement the court ought not to confirm it in any proceeding. The fact is before the court that there are second mortgage bondholders, and also that in an application made, in an action in which they were parties, the court has refused to confirm the agreement. If the agreement is not just and fair to all parties it ought not to be confirmed.

The injunction should be continued when it is clear, from the papers, that if the trustee of one class of bondholders be permitted to carry out the agreement injustice will be done to another class of bondholders.

Where it is a very grave question whether the agreement is valid or not the injunction should be continued *pendente lite*.

Special Term, December, 1877.

Sterling & Walden, for Smithers.

T. F. H. Meyer and B. Roelker, for Meyer.

Blatchford, Seward, Griswold & Da Costa, for plaintiffs.

Reinach agt. Meyer.

LAWRENCE, J.—I am of opinion that the injunction granted by Mr. justice BRADY should be continued *pendente lite*, for these reasons :

First. Since this motion was first brought before me, an application has been made to another justice for the confirmation of the agreement for the extension of the period for the payment of the first mortgage bonds, and such application has been refused by him after a full and elaborate examination of the subject.

The criticism made upon the recent argument, that the application just referred to was made in an action in which the first mortgage bondholders were not made parties, does not strike me as having any force. If it would not be equitable to the second mortgage bondholders to confirm the agreement, the court ought not to confirm it in any proceeding. The fact is before the court that there are second mortgage bondholders, and the fact is also before the court that in an application made in an action in which they were parties the court has refused to confirm the agreement dated September 30, 1876.

If the agreement is not just and fair to all parties, it ought not to be confirmed.

The expressions contained in the opinion of Mr. justice DANIELS, relative to the first mortgage bondholders, I do not regard as indications that he was of the opinion that, in an application made solely by or in the interest of the first mortgage bondholders, the agreement should be confirmed.

The learned justice says, in substance, that it would be grossly unjust to the second mortgage bondholders to change the payments of interest on the first mortgage bonds from currency to gold, and that the court has no authority which would permit it "to take that difference for a period of three years from the holders of the second mortgage bonds and give it to the more fortunate owners of the first, against the objections of those resisting the proceeding."

The maxim that he who seeks equity must do equity seems

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to me to apply with peculiar force to this case. It is clear, from the papers before me, that if the trustee be permitted to carry out the agreement, injustice will be done to another class of bondholders. This alone would be a good ground for the continuance of the injunction.

Second. I am of the opinion that the injunction should be continued for the reason that it is a very grave question whether the agreement of September 30, 1876, is valid.

On a preliminary motion of this character, when the facts are presented solely on the proceedings and affidavits, it is not possible to reach as satisfactory conclusions as upon a trial, but the weight of the evidence seems to be in favor of the position that the agreement made at Amsterdam, September 28, 1869, does not remain in force; but if it does remain in force, I am unable to see under which of its provisions the power is given to make an absolute extension of the time for the payment of the bonds.

Third. If the injunction should be dissolved and the trustees permitted to carry out the agreement of September 30, 1876, great and irreparable injury may be done to the plaintiff.

Fourth. The decision of the Ohio court is not controlling, and, with the views which I entertain of this case, I cannot follow it. The question is discussed by Mr. justice DANIELS so thoroughly, in the opinion just referred to, that I deem it unnecessary to do more than to say that I fully concur in the reasons which he gives for not following the decision of the Ohio court.

Fifth. As there may be a doubt whether the interest of Hodgekin and of the plaintiff can be said to be a common interest, I see no reason for making him a party to this case.

Motion to dissolve the injunction denied, with ten dollars costs.

Matter of United States Rolling Stock Company.

SUPREME COURT.

In the Matter of the Petitions and Applications of THE
UNITED STATES ROLLING STOCK COMPANY.

Jurisdiction — Mortgage foreclosure on railroad running through Ohio, Pennsylvania and New York — Suits commenced in each state — Principal suit in Ohio — Power of New York state courts to grant relief.

The A. and G. W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to one M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. The same receiver was appointed in each state. An application was made in the New York suit by the plaintiff, as creditor, for relief as against the receiver. Such application was opposed upon the ground, among others, that the principal suit was in Ohio; that the suits in New York and Pennsylvania were auxiliary only thereto, and that the relief against the receiver could properly be obtained only in the Ohio suit:

Held, that the objection was untenable. The proceedings in each of the states were independent, so far as they related to the property within its limits, and the relief asked for might be obtained in the New York suit without intrenching upon or conflicting with the orders or decisions found to be within the province of the court of the state of Ohio.

Erie Special Term, January, 1878.

In the foreclosure suits brought by Taylor and Dunphy (*See Taylor et al. agt. The Atlantic and Great Western Railway Co. and others, ante 275*) the same receiver was appointed in each state. An application was made in the New York suit by the United States Rolling Stock Company, as a creditor, for relief as against the receiver. Such application was

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opposed upon the ground, among others, that the principal suit was in Ohio; that the suits in New York and Pennsylvania were auxiliary only thereto, and that relief against the receiver could properly be obtained only in the Ohio suit.

Blatchford, Seward, Griswold & Da Costa, for petitioner.

E. C. Sprague, R. P. Ranney and John G. Milburn, opposed.

DANIELS, J. — The applications made in this proceeding are three in number. The first is for the payment of \$280,899.79, due upon certificates of the receiver of the Atlantic and Great Western Railway Company for the use of rolling stock leased to him by the United States Rolling Stock Company, and used upon the railway. The second is for the payment of one-quarter of one per cent a mile for the use of cars, other than passenger and baggage cars, used in the transaction of the business of the railway while running upon the Erie railway, and in the aggregate amounting to the sum of \$12,012.93. And the third is for an injunction restraining the receiver from paying interest on the bonds secured by a mortgage on that part of the railway situated in the state of Ohio.

Upon the threshold of the presentation of these applications, the objection was taken that they should be remitted unconsidered and undecided to the action of the courts of the state of Ohio. That was predicated upon the circumstance that the railway whose earnings were to be affected was chiefly situated in that state, and for that reason the proceedings which had been taken for its foreclosure and sale had been mainly carried on there; and it may possibly be that the jurisdiction of that court might have been so comprehensively involved as to have been properly attended with that result (*Muller agt. Dows*, 94 *U. S. Sup. Ct. Repts.*, 444). In the case referred to one suit alone was prosecuted for the

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sale of the entire line of road included in the mortgage, but in the proceedings taken for the foreclosure of the mortgage upon this line of railway that was not the fact. While the railway was principally situated in the state of Ohio, it at the same time also passed through the state of Pennsylvania, and so much of the state of New York as intervened between the line of the state and the village of Salamanca. The mortgage which it was designed to foreclose was an incumbrance on this entire property. And in taking the proceedings to secure that end, it appears to have been assumed that it could only be properly and legally done by means of three different actions simultaneously carried on in the courts of each of the three states. The papers in the actions prosecuted in the courts of Pennsylvania and New York do not exhibit it to have been the design that these actions should be merely auxiliary, or subsidiary, to that maintained in the courts of the state of Ohio. The suit pending in this state, on the contrary, appears to have been instituted in the usual and ordinary form for the foreclosure of a mortgage given upon property situated within its limits. The complaint is in the form properly adapted to that object, and the substantial relief applied for is the sale of the mortgaged property under and in conformity to the judgment of this court. What has been invoked by it has been simply the enforcement of the laws of this state, so far as they may be found applicable to its subject-matter; and that is, certainly, a duty which no authority would warrant the remission of to the courts of a sister state. If the action had been one for the enforcement of the laws of the state of Ohio concerning rights to real property situated there, a different disposition of the point might become necessary. Comity would then probably require that the laws of that state should be executed by means of its own tribunals. But the action pending in this court embodies neither of those elements. It has been brought to affect property situated within this state, through the application of

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legal proceedings provided by its own laws, and requiring the aid of one of its own tribunals. And the fact that similar orders have been made in the course of its prosecution to those entered in the court of the state of Ohio does not conflict with, but rather tends to confirm this position. They may have been, in terms, entered more broadly than the final object in view could have required. But that did not change their nature, which evidently was the assimilation of the proceedings *pari passu* in all three of the courts. They were entered by consent, and strict accuracy of verbiage was not required to complete the purposes of the parties. All that has been done confirms but one view, and that is that the proceedings in each of the states were independent, so far as they related to the property within its limits, but at the same time they were required to be uniform, because of the uniformity of the interests to which they related. The objection made to the consideration of these applications must, therefore, be overruled. But in making that determination, it may be proper to disclaim the existence of any intention to entrench upon or conflict with the orders or decisions found to be within the province of the court of the state of Ohio. The first or Ohio mortgage, as it has been designated, is wholly upon so much of the railway company's property as is situated within the bounds of that state. And the same observation is equally as accurate concerning so much of the mortgage under foreclosure as includes that property. To that extent the jurisdiction of that court, as the actions have been commenced and presented, must be held to be exclusive. But with the greatest respect for its proceedings, ability and authority, that can in no proper sense be held to be sufficient to preclude the consideration of the merits of these several applications.

They proceed essentially upon contracts made between the Rolling Stock Company, a corporation existing under the laws of this state, and the receiver, who has received his appointment under the several orders of the courts of the three states. The making and existence of these contracts have

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been conceded in the case; and while their terms are, to a certain extent, presented for construction, they themselves have not been made the subject of any denial. The point of time to which the first agreement related has become involved in dispute, but the adjustment of that dispute is not required for the disposition of the controversy between the parties. The contract itself was made dependent for its validity upon the concurring sanction of the courts of Ohio, Pennsylvania and New York, and that it in the same terms received. It may have been unreasonable and exorbitant in the compensation provided for the use of the cars; but there is nothing whatever in these proceedings showing that to have been the case, and if there had been, that could not prevent its observance as long as the receiver took no measures to secure its revocation, or that of the orders by which it was in plain terms sanctioned and approved. He required the cars leased for the transaction of the business of the railway committed to his custody, and the terms submitted to seem to have been the most favorable under which they could at the time be procured; and, after obtaining and using them in that manner, it is entirely too late to advance the objection that the agreement made was more liberal than it should have been in the way of its provisions for remuneration. The presumption upon this subject is in favor of the justice of the claim made, as the facts are now presented, and that will so far sustain the legality of the demand here made for payment. The amount shown to have accrued, and which has not been paid under the contract, is the sum of \$280,879.79. But that fact, of itself, does not entitle the Rolling Stock Company to a present direction for its payment. That was not the nature of the obligation which the contract placed upon the receiver. But what he agreed to do was, that he would "account to and pay the Rolling Stock Company for the use or rent of the rolling stock used by him, from the date of his appointment to the date of this agreement, in the same manner and upon the same rate and terms as herein stipulated in respect to the stock

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above specified, such payment to be made by delivery of the receiver's certificates," &c. And the manner of such stipulated payment was, that he should make and deliver his official monthly certificates to the Rolling Stock Company for the rental of its cars used by him, bearing interest at the rate of seven per cent per annum, and "payable by him, from time to time, as rapidly as he may be able to do so, from the funds coming to his hands as such receiver, by applying all the net income derived from the operation of the road, after paying current expenses of the receivership and operating the road, and the rental of leased lines and the interest on the old Ohio first mortgages, to the redemption of the certificates issued by the receiver in the order of their issue; it being understood and agreed that these certificates are, by their terms and in pursuance of orders to be made by the courts which appointed said receiver, so expressly authorized to constitute a lien upon the income of the railroad, &c., embraced in such receivership, and likewise a lien prior to the mortgage bonds secured by the second mortgage." The obligation of the receiver for the payment of the certificates to be issued by him was to the same effect, but more tersely expressed in the order of this court declaring its approval of the contract. He was then "directed to appropriate the funds coming into his hands as receiver, to the payment of said certificates on a par with his other operating expenses, preferring thereto, in the order of payment, only claims for labor or services, rentals of leased lines by this court ordered to be paid and the interest on the mortgage represented by Louis H. Meyer and Frederick Schuchardt, trustees;" and the certificates not so paid were declared to be indebtedness of the receiver, and as such chargeable on the mortgage property and its proceeds.

The obligation to pay the certificates which was thus imposed upon the receiver was qualified, not absolute. It was simply to pay, as far as he should be able with the proceeds remaining in his hands, from the earnings of the road after the payment of claims for labor or service, rentals of

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the leased lines ordered to be paid, and interest on the first or Ohio mortgage bonds, and that the answer of himself and the affidavits made by William H. Taylor, one of the trustees under the second mortgage, show him to have performed. By the petition, a different statement of the case was at first made. It was there asserted that he had devoted the earnings of the railway to other demands than those mentioned in the agreement and order; but that has been completely refuted by these affidavits. The verification of the petition by the president of the Rolling Stock Company depended for its effect wholly on the accuracy of information derived by him from some undisclosed source. He may very well, and very honestly, have been mistaken; and he probably was so, for the receiver and the trustees have based their statements upon facts that were within their knowledge, and they must, for that reason, be entitled to complete reliance in what they have so positively affirmed. As this part of the case now stands, the receiver has performed the terms of his agreement, and he can be required to do no more by any order which this court would be justified in making. It was suggested on the argument that reference for a further investigation into the truth of these statements should be made if the preponderance of proof was found to be opposed to the application; and that would ordinarily be directed if the conflict between the affidavits was of an irreconcilable character; but that is plainly not now the case. One of the affiants has stated the facts as he was informed they existed. Those opposed to him have simply shown the information on which he acted to have been unreliable, because the fact itself had no existence. The case is not one for a reference, but for a denial of the application, for the reason that it has been shown to be without support.

The contract under which the second claim arises was a modified continuance of the preceding agreement, after the last day of December, 1876. It was made by correspondence, in which the receiver was offered the use of all other than

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passenger and baggage cars for the mileage earned by them, at the rate of one cent per mile; and that has been allowed to the Rolling Stock Company by the receiver, so far as the cars were used upon the railway committed to his custody. But it appeared that these cars had also been used upon the Erie railway, and for that use the receiver was allowed by that company only three-fourths of one cent per mile, and for that reason he restricted his credits to the Rolling Stock Company to the same sum. This portion of the controversy is still more peculiarly than the other within the province of this court, for it not only arose under a contract deriving its validity from the order of this court, but besides that it related to what has transpired in this state. At least that may be reasonably presumed from the circumstance that the cars were used by the Erie Railway Company. The contract which was made contemplated but one use of the cars, and that was in the business of the receiver; and for that, wherever it might be had, he was to pay one uniform measure of compensation—the sum of one cent a mile for each car. The terms made use of to express the understanding of the parties were plain, and seem to leave no room for construction. If the receiver permitted the cars to be used by the Erie Railway Company, he could only do so under the terms he had agreed to pay for their use. No discrimination whatever was made, because he might not realize that amount himself, and none can properly be made by the court. As to the \$12,012.93 claimed on this account, the application of the Rolling Stock Company must be allowed to prevail; and the order to be made should direct payment of this sum from the moneys properly applicable to it in the receiver's hands.

The motion for the injunction depends upon the effect which should be given to the provision allowing interest to be paid upon the first mortgage debt contained in the contract first considered. It appears that the trustee under the mortgage was about to apply for an order to sell the property included in that mortgage; that was the part of the railway

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which was located in Ohio. To prevent such a sale, which would have been injurious to the interests of all other parties, the trustees agreed with the receiver, with the sanction of the court in Ohio, to pay an installment of one and three-fourths per cent, by way of interest, on the bonds secured by this mortgage, every three months. And for that the sale was to be correspondingly postponed. In brief, it was an agreement to pay seven per cent interest in four quarterly installments, and that was the rates of interest reserved by the mortgage. By the terms of the contract which was made with the Rolling Stock Company, the interest on this mortgage debt was placed upon the same footing as the receiver's current expenses and those of operating the road, and for that reason entitled to be preferred in the way of payment to the certificate issued for the line of the rolling stock. The interest provided for was not that accruing for any particular period of time, but including all the interest arising upon that debt. It was a superior lien upon the property over which the receivership extended, for the nonpayment of which it might at any time be sold. And that must have been the reason why it was so specially excepted in the agreement. The same intent which would include and provide against a part of the accruing interest would equally include it all; and the contract should be construed and enforced in that spirit.

But while that should be the construction, the circumstance so often mentioned must not be overlooked, that this Ohio first mortgage was only made an incumbrance upon so much of the railway as was within that state. It was a charge upon no other property. For that reason, both its principal and interest must be confined to that, as the source from which its payment should be obtained. But the papers showed that nearly all the earnings of the railway were obtained from that portion of it; and under the agreement with the Rolling Stock Company, they may, so far, certainly, be properly used in the payment of this interest; but whatever earnings may be derived from the portion of the road situated in this state, cannot law-

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fully be used in the satisfaction of that claim. It in no way became a lien upon such earnings, and they consequently cannot be appropriated to its satisfaction. Neither the agreement made with the trustee of the Ohio first mortgage, nor the order approving it, requires any thing of that kind from the receiver. He has been merely allowed to pay that interest from the moneys in his hands as receiver, and it must have been intended by the court that he should only use in that way such moneys as could be legally applied to the payment of the debt provided for by the order and the agreement. All that had been legally hypothecated by that mortgage, was so much of the railway as was in the state of Ohio, and the payments on account of it must be made with the moneys secured from that source. This is all that the court, by its order, could have contemplated or intended to allow. It is the plain effect of the order itself, and a broader construction of it would be unreasonable. And while the receiver should not be controlled by a technical injunction, he should still be ordered not to pay the earnings of so much of the railway as is in this state, upon the Ohio mortgage debt, either by way of interest or principal. This direction will dispose of the remaining of these applications, and it is believed that neither conflict of jurisdiction, nor any improper discrimination against the receiver, will be found to arise in any form from the points which have been considered and decided, and at the same time all the relief has been awarded to the applicant which the evidence before the court will justify it in giving. The result is that the first application will be denied, while the second and third must be allowed to succeed to the extent already indicated.

Matter of Deering.

SUPREME COURT.

In the Matter of JAMES A. DEERING.

In the Matter of NANCY PARKER.

Assessment sales — Vacation for error.

Sales made by the clerk of arrears in the city of New York for unpaid assessments for opening public parks, streets and avenues may be vacated for irregularity under chapter 858, Laws of 1858, as amended by chapter 888, Laws 1870, and chapter 812, Laws 1874.

The opening of a public park, street or avenue under the act of 1813 (*chap. 86*), is a "local improvement."

An assessment for a local improvement in said city is not due or a lien until the title thereof is entered in a record of titles of assessment lists confirmed in the office of the clerk of arrears and street commissioner. It is erroneous, therefore, to charge interest thereon from the date of confirmation.

Special Term, June, 1878.

IN each of the above-entitled matters a petition was presented to the court at special term praying that certain sales for unpaid assessments be vacated and canceled. *In the Matter of Deering* the premises were situated on Broadway and Manhattan street and were sold December, 1874, for the term of 1,000 years, for the nonpayment of an assessment for opening Avenue St. Nicholas and widening Manhattan street, confirmed May 24, 1869, and an assessment for opening Morningside park, confirmed June 10, 1870. *In the Matter of Nancy Parker* the premises were situated at One Hundred and Thirty-second street and Twelfth avenue and were sold December, 1874, for the non-payment of an assessment for opening Avenue St. Nicholas and widening Manhattan street.

Various errors were alleged in the petition, among which

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that the notice of sale did not conform to the statute of 1871; that the notice of sale was not published in the designated public newspapers; that no description of the premises was given by the clerk of arrears, and that at the time of sale interest was charged from the date of confirmation of each assessment. Upon the presentation of the petition an order was made to take proofs. Upon the proofs taken the motion to vacate the sales was made.

James A. Deering, for petitioners, cited chapter 358, Laws 1858; chapter 383, Laws 1870, section 27; chapter 312, Laws 1874; *Astor agt. The Mayor* (62 *N. Y.*, 580); *Dolan agt. The Mayor* (*id.*, 475); *In re Arnold* (60 *id.*, 26); chapter 381, Laws 1871; *De Peyster agt. Murphy* (39 *Super. Ct.*, 255); *In re Louisiana St. John* (*MS.* 1877); Blackwell on Tax Titles (*sec.* 161, *et seq.*); *Farnim agt. Rufnim* (4 *Bush*, 260); *Lafertees, Lessee, agt. Byers* (5 *Ham*, 458); *Ronkerdorff agt. Taylor* (4 *Peters*, 349; *S. C.*, 8 *Wheat.*, 681).

William C. Whitney, counsel to the corporation, and *J. A. Beall*, for the corporation, cited chapter 579, Laws 1853; chapter 86, Laws 1813; chapter 302, Laws 1859; chapter 293, Laws 1861; chapter 381, Laws 1871; chapter 358, Laws 1858; *In re Arnold* (60 *N. Y.*, 26); *Dolan agt. The Mayor* (62 *id.*, 472); section 7, chapter 580, Laws 1872; chapter 40, Laws 1867, section 5; 2 Ohio Statutes, 278; 33 Mississippi, 452.

LAWRENCE, *J.* — *In the Matter of Arnold* (60 *N. Y. Rep.*, p. 26) the court of appeals decided that the act of 1858 (*Laws of 1858*), authorizing proceedings to vacate assessments for local improvements in the city of New York, has no application to assessments made under the Revised Laws of 1813 (*sec.* 178, *chap.* 84, *R. L. of 1813, as amended by chap.* 483, *Laws of 1862*) to pay for lands taken for the opening and widening of streets. Judge GROVER, in delivering the opinion of the court in that case, says: "It is clear that the act of 1858 only intended to give the benefit of a judicial

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investigation as to fraud or legal irregularity of assessments made for local improvements in cases where no such investigation had already been had, or might have been had in the amplest manner had the parties desired." The same doctrine was reiterated by the court of appeals in the case of *Dolan* agt. *The Mayor, &c.* (62 *N. Y.*, p. 475), and the court, in alluding to the case of *Arnold*, states that "that decision was placed upon the ground that proceedings for such assessments are conducted before the court, and its confirmation of the report of the commissioners is a judgment pronounced on a full hearing of the parties, and conclusive in its character as to all questions litigated, or *which might have been litigated in the proceeding.*" The petitioner in this case does not, however, ask to have the assessments referred to in her petition vacated.

Such assessments were imposed for benefit derived by the petitioner's property from the opening of St. Nicholas avenue and Morningside park. The proceeding is taken to vacate the sale of the petitioner's property, which was made for the nonpayment of such assessment; and it is alleged that such sale was irregular for the reason that the interest on the amount of each assessment was computed from the date of the confirmation of the report of the commissioners, and not from the date of the entry of such confirmation in the "title of assessment lists confirmed" in the bureau of the clerk of arrears. If the assessment in question were for ordinary paving, or for regulating or grading, or for the construction of sewers, this error would be fatal to the regularity of the sale (*Laws of 1871, chap. 381, p. 141, sec. 1; Matter of Louisiana St. John, opinion of BRADY, J.*).

The question in this case then is, whether while the act of 1858, as amended by subsequent acts, cannot be invoked for the purpose of *vacating an assessment* imposed for the opening of a street, or avenue or park, it can be resorted to for the purpose of *vacating a sale* made to satisfy such assessment where there has been an irregularity in the sale? It will be

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observed that the court of appeals, in the cases to which I have referred, held that the act of 1858 did not apply to assessments for street openings, for the reason that the confirmation of the report of the commissioners is a "judgment pronounced on a full hearing of the parties and conclusive in its character," &c. No such feature attaches to the proceedings taken by the corporation of the city to sell the lands assessed for the nonpayment of the assessment. The same procedure is followed in reference to such sales as obtains in the case of sales of land for the nonpayment of taxes and for all ordinary local improvements. If the reason given in the above cases is the sole reason why the act of 1858 is not applicable to assessments for the opening of streets, that reason fails in regard to *sales* for the nonpayment of such assessments; and such sales may be vacated under the act of 1858, as amended, if the language of the statute is broad and comprehensive enough in its terms to include such sales. I confess that until the decision of the court of appeals, in the case of *John Jacob Astor agt. The Mayor, &c., of New York* (62 N. Y., pp. 588, 591), I was of the opinion that the term "local improvements," as employed in the act of 1858 and in the amendatory acts of 1870 (*Laws* 1870, p. 903) and 1874 (*Laws of* 1874, p. 366), only embraced assessments for regulating, grading, paving, curbing, guttering and sewerage streets, &c. The court, however, held that there was no such distinction between the two classes of improvements as authorized the conclusion that both were not embraced in the terms of the seventh section of the act of 1872 (*chap.* 580).

That act was an act relating to "certain local improvements" in the city of New York, and the reasoning of the learned judge who delivered the opinion in that case showing that the term "local improvement" embraced street openings as well as all other improvements is equally conclusive, in my opinion in this case, to show that the term in the act of 1858, and the acts amending the same, was not limited to improvements other than for street openings, save and except where

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the proceeding is taken to *vacate* the assessment (*Astor agt. The Mayor*, 62 N. Y., pp. 589, 591; *Matter of Arnold*, 60 *id.*, 26; *Dolan agt. The Mayor, &c., id.*, 472).

It seems to me then, that as the reasoning on which the court decided that the provisions of the act of 1858 do not embrace proceedings to vacate assessments for street openings does not apply to sales to satisfy such assessments, that act and the acts amendatory thereto may properly be resorted to, to vacate such sales, if irregular.

The act as amended in 1870, provides that "no assessment" shall be vacated pursuant "to the act hereby amended by reason of fraud or irregularity in the proceedings, by sale of the assessed premises; but upon proof of such fraud or irregularity such sale shall be set aside and the respective rights and liabilities of the assessed persons, and of the mayor, aldermen and commonalty of the city of New York, shall become and be the same as if such sale had not been made."

This language is not, on its face, limited to sales to satisfy any particular kind of assessment. It is general and applied to sales for all assessments, and as the act is remedial and intended for the benefit of those whose property is sought to be subjected to a special burthen for an improvement which, in its most essential feature, is of a public character, the operation of the act should not be restricted by a forced or narrow construction. The objection of the counsel to the corporation that the act of 1858 and the acts amendatory thereof, are not applicable to cases of sales for the nonpayment of assessments for opening of streets, does not appear to be well taken. Having reached the conclusion that sales for the nonpayment of assessments, imposed for street openings, can be vacated under the acts of 1858, 1870 and 1874, for irregularity, and that such sales stand on the same footing as sales for all other assessments, it necessarily results that this application must be granted for the reason stated by Mr. justice BRADY, in the case of *Louisiana St. John (supra)*.

Motion to vacate sale granted.

Stinde agt. Ridgway.

SUPREME COURT.

AUGUSTA STINDE and others agt. JOSEPH RIDGWAY and others.

Action for construction of a will — Heir at law cannot maintain same — Survivorship of persons lost in a shipwreck — Burden of proof — devise in trust.

The heir at law of those in whose favor devises and bequests are made in a will, cannot maintain an action in equity for its construction; nor can those who claim in opposition to the dispositions of the will. Their remedy is legal, not equitable.

Vesting of the legal title, in case of a devise in trust, considered (*Newell agt. Ridgway*, 12 *Hun*, 604, *applied*).

Where the testatrix and her two grandchildren were lost in a shipwreck, and it appearing that a wave bore the testatrix from the saloon in which the children were with her, and she was not seen afterwards alive, the grandchildren being seen alive a few minutes afterwards, when the saloon, with its inmates, was carried away: *Held*, that while from such facts it cannot be said to be absolutely certain that the testatrix died first, yet under the case of *Pell agt. Ball* (1 *Cheves Eq. [S. C.]*, 99), the evidence might justify such conclusion.

The burden of proving a survivorship rests upon the party who claims through it.

New York Special Term, April, 1878.

ACTION for construction of a will.

George C. Genet, for plaintiff.

Samuel Newell and *John D. Taylor*, for defendant.

VAN VORST, J. — This is an action brought by the heirs at law and next of kin of Mary R. Walter and Joseph R. Walter, deceased, for the construction of the will of their grand-

Stinde agt. Ridgway.

mother, Mary Ridgway, who, with her two grandchildren and their father perished in the wreck of the steamship Schiller, in May, 1875.

By the last will and testament of Mary Ridgway, the rest, residue and remainder of her estate, real and personal, after the payment of legacies, was given to trustees, named by her, with full power to sell, lease or otherwise dispose of same, and to invest and reinvest the proceeds.

The same was to be divided by the trustees into two parts, one for each of the grandchildren of the testatrix, Mary R. and Joseph R. Walter. The trustees were directed to pay over the income and proceeds of the two shares, to the grandchildren severally, until they should attain the age of thirty years, when one-half of the principal sum of each share, was to be paid to the grandchildren, respectively, discharged of the trust. The income of the remaining halves was to be paid or applied to the use of the grandchildren until they arrived at the age of thirty-five years, when the balance was to be paid to them discharged of the trust. It was further provided that should the grandchildren die before attaining the age of thirty years, without issue, then the trustees were directed to pay over the principal of the funds, together with the income thereof, to the lawful issue of Frederick A. Ridgway, Moses Ridgway, John Gunn and Henry Gunn, the division to be in four equal parts, one part for the lawful issue of each of said persons.

The two grandchildren perished when they were severally of the ages of seven and nine years.

The plaintiffs, who are the brothers and sisters of Charles H. Walter, the *father* of Mary R. and Joseph R. Walter, who perished with his children on the Schiller, claim that the residuary bequests to the issue of Frederick A. Ridgway and others have never taken effect, and that after the bequests and devises for the benefit of the grandchildren Mary Ridgway *died intestate*; that the personal estate of the testatrix has passed to, and should be administered by, the personal

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representatives of the deceased grandchildren, and that the real estate of Mary Ridgway, the testatrix, descended to her grandchildren and vested in them under the will, and on their death descended to the plaintiffs as an estate of inheritance free from all trusts.

This contention of the plaintiffs is based, in part, upon the assumption that the evidence establishes that the grandchildren survived their grandmother. If the decision of this case turned upon that fact the burden of proving it would rest upon the plaintiffs, and yet it cannot be said to be absolutely certain that she died first.

The testatrix and her two grandchildren with their father were in the pavilion upon the deck after the disaster to the ship. The waves broke over the ship, Mrs. Ridgway was washed out of the pavilion by the sea. Whether she was carried to some other part of the deck or was borne out on the ocean does not appear. It was night. The children with their father were seen alive in the pavilion some ten or fifteen minutes after the grandmother disappeared when it, with its inmates, was swept away. The dead body of the testatrix was afterwards discovered; those of the children were never found.

It may be that the evidence is sufficient to justify the conclusion that the children survived their grandmother as they were last seen alive.

In *Pell agt. Ball* (1 *Cheves* [S. C.], 99), when B. and his wife perished on board of a steamboat at sea by the explosion of one of the boilers which shattered the vessel and caused it to fall to pieces and sink in about half an hour, upon evidence that Mrs. B. was seen and heard to call loudly for her husband immediately after the disaster and that he was not heard to answer, and was not seen or heard at any time after the explosion, it was held that Mrs. B. survived her husband. The court holding that if there be any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact (*Newell agt. Nichols, infra*).

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But I regard the dispositions made by the will as fatal to the plaintiffs' claims, although the fact be conceded, as under the circumstances sufficiently proven, that the children survived the testatrix.

In *Newell agt. Nichols* (12 *Hun*, 604) the will of Elizabeth M. Walter, the mother of Mary R. and Joseph R., and which contained gifts in trust for their benefit, and residuary gifts over in the event of their dying without issue, was considered.

I discover no sufficient reason for adopting a conclusion different from that reached with respect to the will of the mother, and it must now be held that the legal title to the estate, real and personal, vested in the trustees immediately upon the death of the testatrix, and remained in them until the death of the grandchildren, and that no legal title or interest vested in the grandchildren; that upon their death they had nothing to transmit, and they having died without issue before the time limited for their receiving any portion of the principal of the estate the gifts over vested in those to whom they were, upon such contingency, limited. The intention of the testatrix seems very clear. She did not mean to invest her grandchildren with any legal title or estate in the principal of her property until they should attain the age of thirty years. The legal title was to remain in the trustees for the ultimate benefit of those to whom the estate was given, upon the death of the grandchildren without issue, before reaching thirty years of age.

There is no room for adjudging an intestacy. The whole estate was intended to be, and was, fully given away. But there are objections to this action which, in any event, I regard as fatal. The plaintiffs claim as heirs at law of the grandchildren.

Bailey agt. Briggs (56 *N. Y.*, 407) holds that an action for the construction of a will is entertained by a court of equity as incidental to its jurisdiction over trusts. The plaintiffs are neither trustees nor *cestuis que trust*. If the plaintiffs have any rights or claim to the estate they are legal and not equita-

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ble and should be enforced in an appropriate action for their recovery (*Bowers* agt. *Smith*, 10 *Paige*, 193). Besides plaintiffs claim in direct hostility to the dispositions made of the residuary estate after the death of the grandchildren. They are heirs at law, claiming estates given over to the heirs of Frederick A. Ridgway and others, and as such cannot maintain an action to obtain a construction of the will (*Chipman* agt. *Montgomery*, 63 *N. Y.*, 221).

For the assertion of any claim to the specific personal property given to the children absolutely the action is entirely unnecessary.

These views lead to the conclusion that the complaint must be dismissed, with costs.

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ONEIDA COUNTY COURT.

WASHINGTON GARLOCK, respondent, agt. PHILIP JAMES,
appellant.

*Justices' court — Jurisdiction — Non-resident — Short attachment — what must
be alleged in affidavit.*

Prior to 1831 *non-residents* could only be proceeded against by either a *warrant* or *long attachment*. Either process might be used in the commencement of suits against *non-residents* previous to the act of 1831.

By the act of 1831 no new process for the commencement of actions against *non-residents* was created. This act withdrew from use (except in a few excepted cases) the warrant previously available against *non-residents*, and extended for use against them a summons, the use of which hitherto had been prohibited, and also shortened the time for the return of both the summons and attachment.

In order to have the benefit of an attachment against a *non-resident* the applicant must aver the facts that are necessary to be now averred to entitle a party to a long attachment, and superadd to that the facts which change the time for its return from not less than six nor more than twelve days to not less than two nor more than four days. In other words aver what is necessary to change it from a *long* to a *short attachment*.

The affidavit must also give *facts* from which the justice (to whom the application for a *short attachment* against a *non-resident* is made) could judicially determine that the case is one in which a warrant could not issue, or at least it must furnish the best evidence attainable of the fact that a warrant could not issue.

In an action brought in a justice's court against a non-resident by a *short attachment*, the affidavit on which the attachment was obtained read as follows: "ONEIDA COUNTY, ss.: W. G., being duly sworn, deposeth and saith that P. J. is justly indebted to this deponent on a demand arising upon contract in the sum of seventy-six dollars or more over and above all discounts which the said P. J. may have against him. And deponent further saith that the said P. J. is not a resident of the county of Oneida, and that no warrant can issue against him on the

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demand of this deponent according to the act to abolish imprisonment for debt and to punish fraudulent debtors. ”

Held, that the attachment was improperly issued because the affidavit does not state *facts and circumstances* which, under section 26, article 2, title 4, chapter 2, part 8 of the Revised Statutes, or under section 34 of chapter 300 of the Laws of 1831, would entitle the plaintiff to a long attachment.

Held, also, that the affidavit is defective, in that it does not give facts showing how the demand of the plaintiff arose upon contract, and that it states no *facts or circumstances* showing that the demand is not one in which a warrant could be issued against the defendant.

Laro Term, Utica, October, 1877.

W. V. B. McGraw, for respondent.

S. M. Lindsley, for appellant.

R. O. JONES, *County Judge*.— This is an action brought in justices' court before D. GILLMORE, Esq., a justice of the peace of the city of Utica, against a non-resident by a short attachment which was not personally served ; the defendant failing to appear on the return thereof a short summons was issued, and on the return of that, the same not having been personally served, there was no appearance by the defendant and the plaintiff proceeded with the case and took a judgment against the defendant for eighty-one dollars and seventy cents, damages and costs, and from which judgment an appeal was taken to this court on questions of law. The appellant (the defendant) rests his right to a reversal of that judgment upon the fact that the affidavit upon which the attachment was issued was insufficient to confer jurisdiction upon the justice to issue the warrant of attachment. The affidavit reads as follows, to wit :

“ONEIDA COUNTY, ss.: Washington Garlock, being duly sworn, deposeth and saith that Philip James is justly indebted to this deponent on a demand arising upon contract in the sum of seventy-six dollars or more over and above all discounts which the said Philip James may have against him.

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And deponent further saith that the said Philip James is not a resident of the county of Oneida, and that no warrant can issue against him on the demand of this deponent according to the act to abolish imprisonment for debt and to punish fraudulent debtors.

(Signed) WASHINGTON GARLOCK.

Subscribed and sworn to before me, this {
1st day of July, 1874. }

D. GILLMORE,
Justice of the Peace.

It is claimed by the appellant, first, that the attachment was improperly issued because the affidavit does not state facts and circumstances which, under section 26, article 2, title 4, chapter 2, part 3 of the Revised Statutes, or under section 34 of chapter 300 of the Laws of 1831, would entitle the plaintiff to a long attachment (so called); second, that the affidavit is defective, in that it does not give facts showing how the demand of the plaintiff arose upon contract, and that it states no facts or circumstances showing that the demand is not one in which a warrant could be issued against the defendant.

Now, in order to determine the questions, I will refer to the provisions of the statute bearing upon the question and see what light they will shed on the subject.

Section 11, article 2, title 4, chapter 2, part 3 of the Revised Statutes, reads as follows: "Suits may be instituted before a justice either by the voluntary appearance and agreement of the parties or by process. When by process it shall be either a summons, a warrant or an attachment."

Section 13 of the same article reads as follows: "The first process against freeholders and against inhabitants having families, except as otherwise hereinafter directed, shall be a summons, but no person shall be proceeded against by summons out of the county in which he resides."

Section 14 of the same article reads as follows: "A summons shall be directed to any constable of the county where

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the justice resides, commanding him to summon the defendant to appear before the justice who issued the same at a time and place to be named in such summons, not less than six nor more than twelve days from the date of the same, to answer the plaintiff in the plea, in the same summons to be mentioned."

Section 17 of the same article reads as follows: "A justice shall, upon application, issue a warrant in the following cases:

First. Where the defendant is a non-resident of the county.

Second. Where the plaintiff is a non-resident and tenders to the justice security for the payment of any sum which may be adjudged against him in the suit.

Third. When it shall appear to the satisfaction of the justice by the affidavit of the applicant, or of any other witness, that the person against whom such warrant is desired is about to depart from the county with intent not to return thereto.

Fourth. Where the defendant is an inhabitant of the county, having a family, or a freeholder of the same county; and it shall, in like manner, appear to the satisfaction of the justice that the plaintiff will be in danger of losing his debt or demand unless such warrant be granted."

Section 18 of the same article reads as follows: "A justice may, upon application, issue either a summons or warrant at his option.

First. Against a defendant residing in the same county who is neither a freeholder of the county nor an inhabitant having a family.

Second. Against the defendant upon whom a summons shall have been served only by leaving a copy, or in any other way than by reading or delivering a copy to him personally, and who shall not have appeared at the time and place appointed in such summons, nor shown good cause for not appearing. But the suit instituted by such summons shall be deemed discontinued unless the warrant be issued on the same day of the return of the first summons; and if so issued the suit shall be deemed to have been continued thereby."

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Section 19 of the same article, reads as follows: "In all cases, an application for a warrant, except where the suit shall have been commenced by summons, the person applying shall, by affidavit, state the facts and circumstances within his knowledge, showing the grounds of his application, whereby the justice may the better judge of the necessity and propriety of issuing such warrant."

Section 26 of the same article reads as follows: "An attachment against the property of any debtor may be issued on application of a creditor, in the manner hereinafter prescribed, whenever it shall satisfactorily appear to the justice that such debtor has departed, or is about to depart from the county where he last resided, with the intent to defraud his creditors, or to avoid the service of any civil process; or that such debtor keeps himself concealed with the like intent."

Section 27 of the same article reads as follows: "Such application may be made by any creditor, or by his personal representatives, having a demand against such debtor personally, whether liquidated or not, arising upon contract, or upon a judgment rendered within this state, amounting to one hundred dollars, or any less sum."

Section 28 of said article is as follows: "Such application shall be in writing, and shall be accompanied by the affidavit of the creditor, or of his agent, in which shall be specified, as near as may be, the sum in which the debtor is indebted over and above all discounts to the person in whose behalf the application is made, and the grounds upon which the application is made, and the grounds upon which the application is founded, and the facts and circumstances. Such grounds shall be verified by the affidavits of two disinterested witnesses. * * *

Section 30 of the same article is as follows: "Every such attachment shall state the amount of the debt sworn to by the applicant, and shall command any constable of the county in which the justice resides, * * * and to make return of his proceedings thereon to the justice who issued the same, at

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a time therein to be specified, not less than six nor more than twelve days from the date thereof."

Section 215, article 13, title 4, chapter 2, part 3, Revised Statutes (*vol. 3, Banks' 6th ed. of Rev. Statutes, p. 433, sec. 215*) reads as follows: "No execution issued on any judgment rendered by any justice of the peace upon any demand arising upon contract, express or implied, or upon any other judgment founded upon contract, whether issued by such justice or by the clerk of the county, shall contain a clause authorizing an arrest or imprisonment of the person against whom the same shall issue, unless it shall be proved by the affidavit of the person in whose favor such execution shall issue, or that of some other person, to the satisfaction of such clerk or justice, either: first, that such judgment was for the recovery of money collected by any public officer; or, second, for official misconduct or neglect of duty; or, third, for damages for misconduct or neglect in any professional employment." This last section is section 30, chapter 300 of the Laws of 1831, as since amended.

Section 216 of said article reads as follows: "No warrant shall issue against a defendant in any case in which, by the provisions of the last preceding section, an execution on the judgment recovered could not be issued against his body; and whenever a warrant in such case shall issue, the like affidavit shall be required as for the issuing of an execution by the provisions of said section." The last preceding section referred to in this section is section 215, just quoted. This last section is section 31 of chapter 300 of the Laws of 1831.

Section 218 of said article reads as follows: "Whenever, by the provisions of the thirtieth (216) section of this act, no warrant can issue, and the defendant shall reside out of the county, he shall be proceeded against by summons or attachment, returnable not less than two nor more than four days from the date thereof, which shall be served at least two days before the time of appearance mentioned therein; and if such defendant be proceeded against otherwise, the justice shall

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have no jurisdiction of the cause." This section is section 33 of chapter 300 of the Laws of 1831.

Section 34 of chapter 300 of Laws of 1831 (section 219 of the said article above referred to) provides as follows: "In addition to the cases in which suits may now be commenced before justices of the peace by attachment, any suit for the recovery of any debt or damages arising upon any contract, express or implied, or upon any judgment for fifty dollars or less, may be so commenced whenever it shall satisfactorily appear to such justice that the defendant is about to remove from the county any of his property with intent to defraud his creditors, or has disposed of, secreted or is about to assign, dispose of or secrete any of his property with the like intent, whether such defendant be a resident or not."

Then follows section 35 of same chapter (section 220 of said articles last above referred to) with the following: "Before any attachment shall issue in such case, or in the cases provided for in article 2, title 4, chapter 2, part 3, Revised Statutes, the plaintiff shall, by his own affidavit or that of some other person or persons, prove, to the satisfaction of the justice, the facts and circumstances to entitle him to the same, and that he has such a claim as is specified in the last preceding section. * * *"

Then follows section 43 of chapter 300 of the Laws of 1831 (section 227 of said article last referred to) which reads as follows: "All the provisions of said title 4 not hereby expressly repealed, and not inconsistent with the provisions of this act, are hereby declared to be in full force and to apply to the provisions of this act so far as they relate to proceedings in courts before justices of the peace." Now from an examination of the statutes quoted by me it will be observed that prior to 1831 non-residents could only be proceeded against by either a warrant or long attachment. It may be questioned by some as to whether or not a non-resident could, prior to 1831, be proceeded against by long attachment. I fail to see why not. Section 11, first above quoted by me, provides

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that suits might be instituted in justice's court by three different kinds of process, viz.: summons, warrant or an attachment. Section 13 above quoted only prohibits parties from being proceeded against by a long summons out of the county in which they reside. The right to commence an action by attachment is not confined to any particular class, but is open to all classes who come forward and furnish the requisite proof, and make their application in due form and furnish the requisite security. The case of *Dudley agt. Staples* (15 *Johns. R.*, 196) has not escaped my observation, but that is not an authority against the position taken, that a long attachment could, prior to the passage of chapter 300 of the Laws of 1831, issue against the property of non-residents. Section 31 of article 2, title 4, chapter 2, part 3 of Revised Statutes, as found in the first edition of the Revised Statutes of New York, provides as follows: "The constable to whom such attachment shall be directed and delivered shall execute the same at least six days before the return day; and shall attach, take into his custody, and safely keep, such part of the goods and chattels of the defendant as shall not be exempt from execution, and as shall be sufficient to satisfy the demand of the plaintiff. He shall immediately make an inventory of the property seized, and shall leave a copy of the attachment and of the inventory, certified by him, at the last place of residence of the defendant; but if the defendant have no place of residence in the county where the goods and chattels are attached, such copy and inventory shall be left with the person in whose possession the said goods and chattels shall be found." If it was not intended that a long attachment should then issue against non-residents, what was the use of the section last above quoted, providing a mode of service of such copy and inventory on a person who had no place of residence in the county? Could such a person exist and be a resident of the county? It would seem to be pretty clear that he could not. Then it must be that the section contemplated the service of such long attachment on non-resident defendants, and that right would now exist but for

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section 33 of chapter 300 of the Laws of 1831, before quoted. By that section the legislature saw fit to say that the attachment then to be available against non-residents should be returnable in not less than two nor more than four days, instead of being in not less than six nor more than twelve days, as formerly. I do not think that section, by shortening the time for its return from six to four days, created any new process for the commencement of actions against non-residents. It withdrew from use (except in a few excepted cases) the warrant previously available against non-residents and extended for use against them a summons, the use of which hitherto had been prohibited. In removing such restriction as hitherto had stood in the way of the use of the summons against non-residents, the legislature shortened the time for the return of the summons. The object of the legislature in shortening the time for the return of the summons, and attachment to be issued against non-residents, doubtlessly was to enable non-residents thus proceeded against to have a more speedy trial than they could have received on a long attachment or summons, and thereby relieve them from expense to be incurred in waiting, and the object of the legislature in doing away with the warrant to the extent it did, was to do away with arrest for debt on process issuing out of justice's court, in connection with doing away with arrest for debt on processes issuing out of the other courts, as was done by that chapter. The summons was the common process against resident defendants. No affidavit or bond was necessary as a prerequisite to its issuing, after 1831. To obtain its use in the modified form for residents against non-residents, all that was required was proof that the defendant was a non-resident, and that no warrant could issue under the prohibition of said act of 1831. In order, of course, to prove that fact, proof would have to be given and not the mutual conclusions. In other words, not the opinions of the applicant, but facts, to the end that the officer might pass judicially upon the question. I conclude, therefore, that, in order to have the benefit of an attachment

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against a non-resident, you must aver the facts that are necessary to be now averred to entitle a party to a long attachment, and superadd to that the facts which change the time for its return from not less than six nor more than twelve days to not less than two nor more than four days. In other words, aver what is necessary to change it from a long to a short attachment, so called. If it was not intended that those facts should be averred to obtain a short attachment (so called), what was the use of inserting the words, "whether such defendant be a resident of this state or not," at the end of section 34 of chapter 300 of the Laws of 1831, before quoted by me? A man who is not a resident of this state, I apprehend, cannot be a resident of any of its counties. It must be deemed that such expression as the last above quoted by me must have been intended for some purpose. If you hold that a short attachment, so called, can be issued without the allegations necessary for a long attachment to issue, of what use could the expression "whether such defendant be a resident of this state or not" be? Statutes are not to receive construction which will render useless and ineffectual some of their provisions, if the same are susceptible of a different construction, and which will accord or harmonize with the object of the statute. It does seem to me to have been the intention of the legislature to put both residents, who should become guilty of the things prescribed in the two sections for the issuing of attachments against their property, and non-residents, who should become guilty of like acts, on an equality with each other, so far as subjecting their property to attachment was concerned. If I am right in the view I have taken, that chapter 300 of the Laws of 1831 did not create a new process in the shape of a short attachment against non-residents, but only continued the old process of attachment then in use, though shortened as to the time of its return, I am further strengthened in the position that it is necessary to state the facts I have stated to entitle a party to the attachment (*Sec. 43 of*

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chap. 300 of the Laws of 1831). The court of appeals, in *Bennett agt. Brown* (4 *Comstock*, 254), said that section rendered it necessary to make an affidavit and give a bond to obtain an attachment; the court failed to pass upon what was necessary to be alleged in the affidavit. If the short attachment, then, was not a new process, the creature of chapter 300 of the Laws of 1831, it must follow that said section 43 must be held to apply to the contents of the affidavit as well as that one shall be given. I am aware that affidavits, similar in form to the one in this case, where their sufficiency came up collaterally, have in many cases been assumed to be sufficient, the question raised in each of them, however, being some other than the question I have here discussed, except in the case of *Stevens agt. Benton* (39 *How. Pr.*, 13), and which case I shall refer to hereafter. The law I do not consider so settled by judicial authority that it is not open to examination in this case. It was not, says the learned judge who wrote the opinion of the court in that case, necessary to consider the question I have here considered to enable the court to dispose of the case, and it is apparent that the court did not pass upon the question in the case. The opinion expressed upon the question in that case was the individual opinion of the learned judge who wrote the opinion adopted by the court in the case. He does not give his process of reasoning leading him to the conclusion stated by him. In the absence of any knowledge of his process of reasoning leading him to an adverse conclusion to that I have arrived at, and not knowing how thoroughly he did examine the question, and feeling, as I do, that he may have overlooked some of the provisions of the sections here considered by me, I must adhere to the views I have expressed on the subject.

The second point taken by the appellant in the case is also fatal to the judgment of the plaintiff.

The affidavit is defective in a jurisdictional fact which is omitted from the affidavit. The affidavit does not give facts from which the justice could judicially determine that the

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case is one in which a warrant could not issue, or, at least, it does not furnish the best evidence attainable of the fact that a warrant could not issue. For aught that appears in the affidavit upon which the attachment was granted, it may be that the demand arising upon contract specified therein was for the recovery of money collected by a public officer. An action based upon such a demand would be an action on an implied promise to pay over the same in the specific money collected or other current funds, or rather for damages for the breach of contract growing out of such implied promise. So "a demand for neglect in a professional employment" would be a demand arising upon contract, for every professional employment implies a promise on the part of the employed to be diligent and not to neglect his employment; and if he does neglect it the law steps in and says he shall respond in damages for any such breach thereof. The affidavit would be true in alleging, in either of such cases, the cause of action was upon contract; yet if the contract, out of which the cause of action grew, was one of those stated by me it would be a case in which a "warrant" could issue, and, therefore, a short attachment could not. The affidavit does not give facts showing what kind of a contract the cause of action grew out of. You have only the judgment of the party on it. Then could the justice, on the proof before him, say the case was not one in which a warrant might have issued? The only evidence he had was the mental conclusion of the plaintiff stated in the affidavit. That is not the best proof of the fact, and in fact is no legal proof whatever of the fact. If so the justice issued the attachment without authority of law. Facts and not mental conclusions should have been given to the end that the justice might have passed judicially upon the question with the facts properly before him. The appellant had the right, upon the argument of this appeal, to insist for the first time on the want of such proof, which he did do. It follows, for the reasons stated as to the two defects in the affidavit in this case, that the judgment appealed from must be reversed.

Judgment reversed, with costs.

Lasher agt. Northwestern National Insurance Co.

SUPREME COURT.

JANE A. LASHER and others agt. THE NORTHWESTERN
NATIONAL INSURANCE COMPANY.

*Fire insurance — Warranty by insured — Estoppel — Demurrer to a reply —
Reference.*

Where the policy of insurance was issued to plaintiff as the owner of certain personal property, the language used therein importing that there was a warranty by her that she was the owner thereof in fact at the time of such insurance when she really was only the possessor of such property under a contract of purchase upon which she had made payments to a considerable amount, and where the defendant (the insurance company) was truly apprised by her, at the time of the application for the policy, of her interest in the insured property, and the company itself, after such information, writing the application, making out and delivering the policy as sufficient in form and language to indemnify the parties interested against loss by fire to the extent stated in such policy, and receiving from the insured the premium on the faith of the validity of the insurance:

Held, that on such a state of facts the plaintiff was entitled to recover.

When an insurance company has not been in any way deceived, and when it draws an application for a policy in a particular form, stating, in effect, that it truly embodies the position the party occupies as to the property from such statement, and then upon the receipt of the premium delivers a policy as valid and effectual to indemnify the insured against loss by fire to the property under the circumstances truthfully disclosed:

Held, that such company cannot set up the want of literal and exact truth in the papers which it has itself prepared, and allege its own ignorance or fraud as a defense to the contract which it delivered as valid and legal.

Upon such facts the company is *estopped* from denying the truth of the written statements which it has caused the insured to make.

There can be no breach of a warranty unless its falsity can be shown.

Where both parties, with a knowledge of the actual facts, contract upon the faith that the legal position resulting from such actual facts is truly

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expressed in writing, and so long as there is no actual fraud or misrepresentation, both parties are concluded and *estopped* from denying the truth of that which has thus been expressed.

The case of *Kennedy agt. St. Lawrence County Mutual Insurance Company* (10 Barb., 289) commented on and criticised.

Where a policy of insurance contained a clause to the effect that "if differences of opinion should arise between the parties hereto as to the *amount* of loss or damage upon property partially damaged, the *subject* shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement they to select a third) who shall, under oath, ascertain, estimate and appraise such partial loss or damage upon each article separately, and their award in writing shall be binding on the parties hereto, each party paying one-half the expense of reference:"

Held, that the insured could recover without an offer to refer, where there is no dispute "as to the *amount* of loss or damage," the only question being as to the validity of the policy. The clause in the policy provides only for a case of difference as to the *amount* of a loss.

Ulster Special Term, March, 1876.

DEMURRER to a reply.

Wm. Lounsbery, for plaintiffs.

Norwood & Coggeshall, for defendant and demurrer.

WESTBROOK, J. — The demurrer to the reply in this cause presents, substantially (and the defendant has only argued) two questions:

First. Conceding that the policy of insurance is issued to Jane A. Lasher, as the owner of certain personal property, the language used therein importing that there was a warranty by her that she was the owner thereof in fact at the time of such insurance, and further, conceding that she really was only the possessor of such property under a contract of purchase upon which she had made payments to a considerable amount, can she recover, provided the defendant was truly apprised by her, at the time of the application for the policy, of her interest in the insured property, and the

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defendant itself, after such information, writing the application, making out and delivering the policy as sufficient in form and language to indemnify the parties interested against loss by fire to the extent stated in such policy, and receiving from the insured the premium on the faith of the validity of the insurance? In other words, when an insurance company has not been in any way deceived, and when it draws an application for a policy in a particular form stating, in effect, that it truly embodies the position the party occupies as to the property from such statement, and then, upon the receipt of the premium, delivers a policy as valid and effectual to indemnify the insured against loss by fire to the property, under the circumstances truthfully disclosed, can such company set up the want of literal and exact truth in the papers which it has itself prepared, and allege its own ignorance or fraud as a defense to the contract, which it delivered as valid and legal?

Second. When a policy of insurance contains a clause to the effect, "If differences of opinion should arise between the parties hereto, as to the *amount* of loss or damage upon property partially damaged, the *subject* shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement they to select a third), who shall, under oath, ascertain, estimate and appraise such partial loss, or damage, upon each article separately, and their award in writing shall be binding on the parties hereto, each party paying one-half the expense of reference;" can the insured recover, when there is no dispute "as to the *amount* of loss or damage," and the only question is as to the validity of the policy, without an offer to refer?

Time will not allow me to prepare an elaborate opinion upon the questions submitted, nor is it necessary, as they seem to me to depend upon simple principles. Regarding them in the order stated, upon the first point, we observe:

The insured is oftentimes ignorant of the mode and manner of effecting an insurance. Technical terms and phrases are

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seldom comprehended by the party applying for a policy of insurance, and the papers are prepared by the insurer as a rule, who knows, from familiarity with that business, the force of every term employed. In this cause, according to the allegations in the pleadings which the demurrer admits, the plaintiff, a lady, applies to the defendant for a policy of insurance upon personal property, her exact interest in which she truly states. The proposition to insure is accepted, and the defendant prepares the papers, which, by the simple act of delivery upon such a proposition, and its acceptance, it assures her are valid and sufficient to accomplish that object. Relying upon the truth of that assurance, which is plainly involved in the circumstances we have detailed, the premium is paid, and the contract accepted. In the course of time a loss occurs, and the indemnitor defends upon the ground that it (the company) has induced the insured, who meant to be honest, to tell an untruth upon paper, which untruth (of which the insured was ignorant) contrary to the express assurance of the company involved in the act of the delivery of the policy, vitiates and avoids the contract, upon which the insured, in the security of ignorance, reposed. If this is the law, it is not justice. Upon such facts, I hold that the party is estopped from denying the truth of the written statements which it has caused the other to make. Both parties, with a knowledge of the actual facts, contract upon the faith that the legal position resulting from such actual facts is truly expressed in writing, and so long as there is no actual fraud or misrepresentation, both parties are concluded and estopped from denying the truth of that which has thus been expressed. There can be no breach of a warranty unless its falsity can be shown, and in this case the defendant cannot question its truth, because it undertook to deliver a policy of insurance which would be valid and effectual to protect the actual interest of the insured, which was truthfully stated, and which the insurer well understood.

The case of *Kennedy* agt. *St. Lawrence County Mutual*

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Insurance Company (10 Barb., 289) is not satisfactory to my mind. The doctrine of estoppel seems to have been entirely overlooked by the learned judge who wrote the opinion. Because the warranty is false, he argues, there can be no recovery. The point now made goes beyond this position. The party who has induced another to make a false statement in writing, when in uttered words the whole truth was spoken, by causing him or her to believe that the writing embodies truthfully the result of spoken sentences, is in no position to question the truth of the writing. As to him it is absolutely true, and the courts will not relieve him from a contract made, not on faith of the writing but on faith of oral utterances, which he undertook faithfully to embody in writing. It will also be noted that in the case referred to the misstatement was the act of an *agent*. In this the pleading avers that the *defendant* itself has, with full knowledge of the facts, prepared the papers alleged to be false. In that case, though the agent was not deceived, yet the company might have been. In this there is no room for any such argument, if that fact could make any difference, which I do not concede. It presents the clear, clean question whether an insurer, who has not been deceived or misled can avail itself of a wrong statement which it has caused the insured in ignorance to make, and vitiate and annul an agreement which, by its delivery, it declared to be legal and binding to carry out the oral application for insurance, and for which the insured parted with her money? To my mind this proposition presents no difficulty, and the moral sense, it seems to me, of every right-minded person revolts at the deliberate attempt to take advantage of its own wrong which the defense involves. Of course upon the trial the proof may not come fully up to the allegations of the pleading. If it does not the trial court will protect the defendant. Treating the reply as literally true I think the defendant is estopped from questioning the truth of the allegation that the insured, Jane A. Lasher, was the owner of the property destroyed. Neither do I see any force in the point

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that the plaintiffs cannot maintain this action without an offer to refer. The clause in the policy very obviously, I think, provides only for a case of difference as to the amount of a loss. It so expressly declares, and the referees are simply to appraise damages. No argument can render more clear the thought which the mere reading of the clause conveys. Not only does it distinctly say when "differences of opinion * * * arise between the parties * * * as to the *amount* of loss, * * * *the subject*," *i. e.*, "the amount" of such loss "shall be referred to two disinterested and competent men," but the whole sentence, in defining the duties of the referees, limits their work to an appraisal and estimate of the damage sustained. It covers, therefore, only a case when the company admits its liability but questions its extent. As the defense in this action is based upon the supposed invalidity of the policy as a whole this ground of demurrer must also be overruled.

Judgment is rendered for the plaintiffs upon the demurrer, and the form of the order will be settled on notice.

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SUPREME COURT.

JANE A. LASHER and others agt. THE NORTHWESTERN
NATIONAL INSURANCE COMPANY.

*Insurance, fire — Insurable interest — printed clause — Non-payment of
premium — Waiver — Parties.*

Where, by a policy of fire insurance, a portion of the loss is made payable to a third person, "as his interest may appear," the language imports an ownership in the property in such third person.

A provision in the printed part of a policy of fire insurance, that "if the interest of the assured be any thing more than the entire, unconditional and sole ownership of the property, * * * it must be so expressed in the written part of the policy, otherwise the policy shall be void," may be waived by the company.

The policy of insurance insured "J. L. on her household furniture," &c., &c., as described in the policy, "loss, if any, payable to A. S. and W. L., as their interest may appear." The furniture upon which the insurance was effected was held by J. L. under an agreement for its purchase with the other two plaintiffs, A. S. and W. L., who retained the title until the purchase-price was fully paid, which price was to be paid in installments, she having, under certain restrictions, the right to possess and use the property. The policy contained, in the printed part thereof, this clause: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the said assured, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void."

Held, that J. L. had an insurable interest in the property.

Held, also, that the provision in the written part of the policy, that the "loss, if any," shall be "payable to A. S. and W. L., as their interest may appear," is equivalent to an express declaration that J. L.'s interest is less than that of "entire, unconditional and sole ownership;" and the requirement in the printed clause of the policy has been literally complied with by an announcement in the written part thereof that A. S. and J. L. have an interest in the property.

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Held, further, that even if the printed clause in the policy required the *exact and true* interest of the assured in the property to be stated in the written part thereof, the company have waived this requirement by issuing the policy and delivering it as one fully and completely obligatory.

A clause in a policy of insurance requiring the payment of the premium before the policy takes effect may be *waived*, and such waiver may be shown by direct proof that credit was given, or may be inferred from circumstances.

In an action on a policy of fire insurance, where the loss was payable to others than the party insured, the insured may be a proper and necessary party. In this case, though the loss was payable to others, from the nature of the insured's agreement with them, she having obligated herself to pay them an agreed price for the property insured and damaged by the fire, she had an interest in the subject of the action, and in obtaining the judgment demanded, and was properly joined as plaintiff (*Code of Procedure, sec. 446*).

Ulster Circuit, January, 1878.

William Lounsbury, for plaintiff.

Carlisle Norwood, Jr., for defendant.

WESTBROOK, J.— This cause was tried at the Ulster circuit January 14, 1878, without a jury. It was an action upon a policy of insurance dated August 21, 1874, issued by the defendant, whereby it insured "Jane A. Lasher, on her household furniture," &c., &c., as described in the policy; "loss, if any, payable to Artemas Sahler and William Lounsbury, as their interest may appear," to the amount of \$2,500.

The furniture upon which the insurance was effected was situate in a building known as "the Woodstock Overlook Hotel," kept by the plaintiff, Mrs. Lasher, and was held by her under an agreement for its purchase with the other two plaintiffs, Lounsbury and Sahler, who retained the title until the purchase-price was fully paid, which price was to be paid in installments, she having, under certain restrictions, the right to possess and use the property.

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The policy of insurance contained, in the printed part thereof, this clause: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the said assured, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void."

Confessedly the interest of Mrs. Lasher was less than that of "entire, unconditional and sole ownership of the property," and as the extent of the interest held by her was not stated in the policy, it is claimed by the defendant that there can be no recovery. It is not disputed but that Mrs. Lasher had an insurable interest therein, and that she had is expressly settled in *Rohrbach agt. The Germania Fire Insurance Company* (62 N. Y., 47), but the point made is, that the policy should have stated its *exact* character.

The first answer to the objection is, that the clause referred to does not require the policy to specifically state the extent of the interest of the insured, when such interest is less than of "entire, unconditional and sole ownership," but it only requires the fact, that it is less, to be "so represented to the company, and so expressed in the written part of the policy," and precisely that has been done. The written part of the policy provides that the "loss, if any," shall be "payable to Artemas Sahler and William Lounsbery, as their interest may appear;" and this is equivalent to an express declaration that Mrs. Lasher's interest is less than that of "entire, unconditional and sole ownership," as the expression plainly imports, and as has been expressly decided (*Pitney agt. Glen's Falls Ins. Co.*, 65 N. Y., 6). The requirement in the policy has been literally complied with by an announcement in the written part thereof that Lounsbery and Sahler have an interest in the property, and, consequently, Mrs. Lasher's ownership could not be exclusive; and as this the company has declared in the policy, it must have been here so represented to it.

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The answer already given to the objection is complete, and the form of the clause in the policy distinguishes it from many of the cases cited by the counsel for the defendant, but there would, it seems to me, be no difficulty, even though the printed clause in the policy hereinbefore given required the exact and true interest of the insured in the property to be stated in the written part thereof. The company had information, as the policy shows, that Mrs. Lasher was not the "entire, unconditional and sole" owner of the property insured, and yet it issues and delivers as a valid and binding policy of insurance one which, upon its face, shows, and that in the written covenant specifying to whom the loss is to be paid, that Mrs. Lasher is not the sole owner, and when a loss occurs it deliberately points to a printed clause in the policy which probably the insured never read and never saw, making invalid and void the written covenant to which the insured only looked, and which, by the very act of delivery of the policy, the company declared to be valid. This certainly cannot be sound. The company had a right to waive the clause upon which its objection to a recovery is now based, and such waiver could be made in no more effective and convincing a manner than by issuing the policy upon which this action is founded and delivering it as one fully and completely obligatory. The policy, from the language employed and its delivery, as valid, can properly be read: "Though the extent of Mrs. Lasher's interest in such property is not stated in this policy as another clause herein requires, we do still insure the property herein specified against loss or destruction by fire, and we hereby agree to pay such loss to William Lounsbery and Artemas Sahler as their interest may appear." Against such a covenant and recital as this, the printed clause would be most clearly inoperative because it is directly waived, and yet no construction of the language actually used, which reads this policy by the light of its delivery as a binding obligation, can make it less forcible than that we have employed to express its meaning. Surely he who, without being

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deceived and with full knowledge in *loud and audible terms*, makes a promise should not be allowed by *whispered words* never heard by the promisee, though spoken at the same time, to invalidate the promise which such promisee heard and relied upon. And so an insurance company which points to a written promise to pay in a certain way, and which the insured sees and accepts from it as valid, should not be allowed to set up a printed clause in the same instrument, to which attention was never directed, to invalidate the written promise when the written promise itself shows that the company had actual knowledge that the very thing needed to make the writing valid was omitted therefrom. Good faith and common honesty require that such a defense shall not succeed. Every principle applicable to waiver and estoppel applies to it.

The defendant also insists that it is not liable because the premium had not been paid. It is now perfectly settled that a clause in the policy requiring the payment of the premium before the policy takes effect may be waived, and such "waiver may be shown by direct proof that credit was given, or may be inferred from circumstances" (*Bodine et al. agt. Exchange Fire Ins. Co.*, 51 *N. Y.*, 117). The proof that there was such a waiver in this case is clear. On the 18th of December, 1874, the defendant's general agents wrote to Mrs. Lasher that the premium due on her policy was not paid, and saying "we will commence suit for the amount unless paid by twenty-sixth instant." The policy had been issued and delivered in August, 1874. On March 19, 1878, the same agents wrote to Mr. William H. Fredenburgh, an insurance agent in Kingston, and who had procured the insurance, and had acted as agent of both parties, "to collect the premiums or send us the policies." This letter recognizes Fredenburgh's right to collect; and he had, on the 11th day of February, 1875, more than a month before this letter was written, accepted Mrs. Lasher's note for a sum which included the amount due for the premium, which note at maturity was paid.

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The objection, founded upon the fact that there has been no arbitration to fix the amount of the loss, is answered in a former opinion written in this same cause, and which was rendered upon the demurrer, and to which opinion reference is made. Suffice it now to say that the condition of affairs has not arisen which makes that clause in the policy applicable. No "differences of opinion between the parties" to the contract ever have existed, or do now exist, "as to the *amount* of loss or damage," but the differences relate to the binding force of the policy itself. Indeed, the pleadings admit (the complaint averring it, and answer not denying it) that the loss was greater than the amount of the policy. Under such circumstances an arbitration to fix the amount of loss would have been useless, and was not required by the policy.

The action was not prematurely brought, because the sixty days, which the policy requires to elapse after proofs of loss are furnished, had actually expired. The first proofs of loss were sufficient. The party who verified them was no stranger, but John E. Lasher, the husband and agent of the insured, who proved his authority by his oath. If to satisfy the defendant the plaintiffs subsequently furnished an affidavit of Jane A. Lasher, such act was not a waiver of the prior proofs, which were clearly valid. Such first proofs were furnished April 16, 1875, and the action was commenced September 6, 1875. More than sixty days intervened, as these dates show, between the furnishing of the proofs and the commencement of the action.

It is, lastly, objected that Mrs. Lasher should not have been joined as plaintiff because the loss was payable to Lounsbery and Sahler.

This objection is not well taken. Section 446 of the Code provides: "All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly provided in this act." Mrs. Lasher was the party insured, and though the loss was payable to others, from the nature of her agree-

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ment with them, having obligated herself to pay them an agreed price for the property insured and damaged by the fire, she had an interest in the subject of the action, and in obtaining the judgment demanded.

My conclusion is, that the plaintiffs are entitled to recover the amount of the policy and interest.

Williams agt. Pitts.

SUPREME COURT.

GEORGE N. WILLIAMS, as survivor, agt. WILLIAM R. PITTS
and EDWIN W. GILBERT.

Assignment giving preferences — when and to what extent void under bankrupt act.

Although an assignment giving preferences is void under the bankrupt act, under the conditions therein provided, it is void only as to persons and proceedings under that act, and except as to such persons and proceedings it is valid as ever.

Ontario Equity Term, March, 1878.

MOTION by plaintiff for judgment upon verdict on issues settled.

W. H. Adams, for motion.

H. M. Field, opposed.

ANGLE, J. — If *Bostwick* agt. *Burnett* (18 *Hun*, 301) be sound, this motion should be granted, for it holds that an assignment giving preferences is not only void as against proceedings under the bankrupt act, but it also holds that it is void in the state courts as to persons claiming under state adjudications or under the process of state courts. The opinion in the above case, written by justice BARNARD, and concurred in by justice GILBERT, refers to none of the adverse decisions, and it is opposed to the following: *Dodge* agt. *Sheldon* (6 *Hill*, 9); *Seaman* agt. *Stoughton* (3 *Barb. Ch. R.*, 344); *Schryock* agt. *Bashore* (13 *National Bank Reg.*, 481,

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495); *Atkins* agt. *Speer* (8 *Met.*, 490); *Malibie* agt. *Hotchkiss* (38 *Conn. R.*, 80; *S. C.*, 15 *National Bank Reg.*, 485; *S. C.*, 9 *Am. R.*, 364); *Bromley* agt. *Goodrich* (40 *Wis. R.*, 131; *S. C.*, 22 *Am. R.*, 685); *In the Matter of Beisenthal* (15 *National Bank Reg.*, 228).

If *Bostwick* agt. *Burnett* were the only case in this state on the point, I should obediently follow it, notwithstanding the array of other authorities opposed; but *Dodge* agt. *Sheldon* and *Seaman* agt. *Stoughton* are each of equal dignity and authority with it in our own state, although not so recent, and appear to me so plainly sound in principle that I deem myself at liberty to follow these, and the numerous corresponding decisions also cited, and order judgment for the defendant in this case, and by so doing hold that, although an assignment giving preferences is void under the bankrupt act, under the conditions therein provided, it is void only as to persons and proceedings under that act, and except as to such persons and proceedings it is valid as ever.

Holley agt. Van Dolsen.

SUPREME COURT.

AUGUSTUS F. HOLLEY agt. ABRAHAM VAN DOLSEN and others.

Mechanic's liens—when ineffective—when lienors proper parties to an action of foreclosure.

The filing of a notice of lien by a material-man, creates no lien upon the premises described, where the party to whom the materials were furnished was erecting the buildings for the owner of the land, who had engaged to advance to the builder the moneys as the work advanced, there being nothing due upon the contract when the lien was filed and the builder afterwards abandoned the work, which was completed by the owner with his own means.

ROBINSON, J., in *Burbridge agt. Marcy* (54 How., 446), followed.

Where the builder had an equitable interest under the contract, and would be entitled to the premises upon complying with the terms of a contract with the owner, which he never did, *held*, that, in action by the owner of the land to foreclose the interest of the builder, the persons filing the notices of lien and making adverse claims to the owner were proper parties.

Special Term, March, 1878.

THE defendant, Da Cunha, had a contract with the plaintiff, who was the owner of certain lots of ground in New York, to build for plaintiff dwelling-houses thereon. Da Cunha was to be paid by installments, as the work advanced. He was, upon the completion of the work, and upon paying the plaintiff for the building and lots, upon terms fixed between them, to be entitled to the premises.

During the progress of the work of building, the defendant, Van Dolsen and others, who had furnished material to Da Cunha used in the building, filed notices of liens upon

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the premises. But at the time of filing the notices of liens there was nothing due Da Cunha under his contract with plaintiff, and Da Cunha, subsequently abandoning the work, the same was completed by the plaintiff, with his own means.

The plaintiff commenced this action to foreclose the equitable right and interest of Da Cunha under the contract, and makes the persons who had filed liens parties to the action.

Frederick Smyth, for plaintiff.

Mr. Norwood, for defendants.

VAN VORST, J. — I think the action of the plaintiff is well brought. It affords a proper and convenient means of testing and disposing of the interests involved, and the various claims interposed as liens upon the plaintiff's property.

The defendants, Van Dolsen, Amott and Cochran, acquired no liens upon the plaintiff's land, in pursuance or by virtue of their claims filed. There was nothing due Da Cunha under his contract with the plaintiff at the time of filing the claims of the defendants; and his abandonment of the work, and allowing the same to be completed by the plaintiff with his own means, left nothing remaining in Da Cunha's favor to which the liens could attach so as to affect either land or buildings, the latter having been constructed with the plaintiff's money.

The land belonged to the plaintiff, and the interest of Da Cunha therein, at best, was equitable only, to be enforced by him in the event that he fulfilled his part of the contract. This he failed to do.

Da Cunha was not the agent of the plaintiff; he was struggling to acquire rights and property in himself. In that he failed completely.

It was proper to make these defendants parties to this proceeding. They claimed an interest adverse to the plaintiff's. This appears by the pleadings.

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It is a rule in equity, that all persons should be made parties, whose presence is necessary to a complete judgment, with respect to the interests involved, as disclosed by the pleadings (*Green agt. Millbank*, 3 *Abb. N. C.*, 155).

The clear and able opinion of ROBINSON, J., in *Burbridge agt. Marcy* (54 *How.*, 446), which I follow, is adverse to the claims of these defendants.

There should be judgment for the plaintiff for a sale of the premises, but as to the defendants, Van Dolsen, Arnott and Cochrane, the plaintiff is not entitled to costs

Anderson agt. Hunt.

SUPREME COURT.

WILLIAM S. ANDERSON agt. ABRAM R. HUNT.

*Order of arrest — when motion to discharge or vacate order will be granted —
Insufficient proof to establish fraud.*

An order of arrest will be vacated where the allegations of fraud are unproven, and where there is no motive shown to cheat.

Evidence of false and fraudulent representations commented upon and declared insufficient to sustain the order of arrest.

Kings Special Term, August, 1876.

MOTION to discharge or vacate order of arrest.

The action was brought for goods, consisting of builders' materials, &c., sold and delivered in the state of New Jersey.

The defendant resided at Hempstead, Long Island; and the summons and complaint were served January 17, 1876, the amount claimed was \$1,061.11.

On January 13, 1876, an order for defendant's arrest was granted by Mr. justice PRATT, on an affidavit of the plaintiff, setting forth alleged false and fraudulent representations as to his financial standing in the contraction of the debt, upon which the defendant was held to bail.

The answer denied the amount of the indebtedness, and offered judgment for \$641.63.

Further facts sufficiently appear in the opinion.

Chas. G. Cronin, for motion.

John Fleming, opposed.

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J. F. BARNARD, *J.* — This action is upon contract. The claim is for goods sold in New Jersey. The goods were building materials, and were used in the construction of a house for a Mr. Marks in that state. The rule is, in such a case, exemption from imprisonment. The plaintiff seeks to take the case out of the general rule by establishing the fact that the debt was fraudulently contracted. That defendant falsely represented himself to own real estate and to be responsible.

There were but four witnesses to this contract; plaintiff and his book-keeper on one side, and defendant and a Mr. Olmsted on the other. Plaintiff and the book-keeper testify that Olmsted said that Hunt was responsible and owned real estate on Long Island. Plaintiff testifies that Hunt said "it was as Mr. Olmsted stated." Olmsted, who was the architect, makes affidavit that he said nothing in regard to Hunt's responsibility, or his ownership of real estate; and Hunt swears he never heard any statement in reference thereto, and that he made no statement whatever about his responsibility.

This leaves the allegation of fraud quite unproven. There is no reason why Olmsted should state the facts as to Hunt's responsibility, especially as he knew nothing about the matter. He had been requested by plaintiff to bring him business; it was this request, he says, which induced him to recommend Hunt to plaintiff as a purchaser. The building was to be built in New Jersey, a fact which plaintiff knew, where lien laws exist for lumber sold to a contractor and used in the construction of buildings.

There is no motive shown to cheat. Defendant has not been paid for the work and materials, and the claim is yet in suit. It could not have been supposed by defendant, when he purchased the lumber, that Marks would refuse to pay. Marks testifies that defendant abandoned the contract. If this is so, defendant surely never intended to buy lumber and put it on Marks' premises and abandon it without payment, and, to accomplish that end, persuaded Olmsted to tell a false-

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hood as to his responsibility. It seems to me that the fraud is not made out. It was not expected by either party that the payments for the lumber were to be made from any other source than the price of the building; unfortunately, this resource has as yet failed.

Motion to discharge from arrest granted with ten dollars costs; costs to be deducted from plaintiff's claim; defendant to stipulate to bring no action for false imprisonment.

Rumsey agt. Lake.

SUPREME COURT.

RUMSEY AND RUMSEY agt. LAKE.

Misjoinder of parties — Demurrer to complaint — Assault and battery on wife — Action by husband and wife.

Misjoinder of parties plaintiff is ground of *demurrer* to the complaint.

Where husband and wife unite in bringing an action, and the complaint shows that one alone must bring the action without the other, a *demurrer* will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

An action for an assault and battery upon the person of a married woman must be brought in her name alone, and if the husband unite in bringing the action a *demurrer* will lie on the ground that the complaint does not state facts sufficient to constitute a cause of action.

The correct rule seems to be that if there is a misjoinder of parties, or, in other words, if the facts stated in the complaint show no cause of action against the defendant *in favor of one* of the plaintiffs, the defendant may demur, under subdivision 6 of section 144 of the Code, *as to such plaintiff* upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and as to such plaintiff the complaint will be dismissed.

Oswego Special Term, June, 1875.

THE complaint states that the plaintiffs were husband and wife in March, 1875, when the assault and battery were committed upon the person of the female plaintiff, wife of the other plaintiff. The defendant specifies for ground of demurrer, (1) that it appears on the face of the complaint that there is a misjoinder of parties plaintiffs; (2) that it appears that the action should be in the name of the female plaintiff and that her husband was improperly joined; (3) that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiffs against the defendant; (4) that the complaint does not state facts sufficient to constitute a

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cause of action in favor of plaintiff, John C. Rumsey, against said defendant; (5) that the complaint does not show that any interest in the cause of action is in John C. Rumsey; (6) that it appears that the action concerns the separate property of the plaintiff Rosetta, and therefore John C. is improperly joined.

S. N. Dada, for plaintiffs.

R. H. Tyler, for defendant.

HARDIN, J. — The question raised by the demurrer in this case has been considered in the general term in this district and determined in *Mann agt. Marsh* (35 Barb., 68), and a like question in *Richtmyer* and *Richtmyer* (50 Barb., 55), and those cases must be followed and the demurrer sustained (24 How., 353). These cases are referred to by Mr. Wait in his excellent work on practice, and the rule declared therefrom laid down as the correct one (*See vol. 1, Wait's Practice*, 115 and 120). He says: "If there is a misjoinder of parties, or, in other words, if the facts stated in the complaint show no cause of action against the defendants in favor of one of the plaintiffs the defendant may demur, under subdivision 6 of section 144 of the Code, as to such plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and as to such plaintiff the complaint will be dismissed." If this objection is not taken by demurrer it may be at the trial and the same result reached, in pursuance of section 274 of the Code, and judgment given in favor of the party plaintiff proving a cause of action, and against the party plaintiff having none (*Palmer agt. Davis*, 28 N. Y., 242; 50 Barb., 55). The same rule is stated by FOLGER, J., in *Simon agt. Canaday* (53 N. Y., 301). There is nothing in the features of *People agt. Crooks* (53 N. Y., 649) inconsistent with the rule laid down or declared in *Simon agt. Canaday* (*supra*).

The act of 1862 (*chap. 219, sec. 3*) allows a married woman to "bring and maintain an action in her own name for dam-

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ages against any person or body corporate for any injury to her person or character, the same as if she *were sole*," and the money received shall be her sole and *separate property*. The section also provides she may give a bond in any such action *as if she were sole*. This section may well be considered as vesting in her the right to recover for injuries. Thus she becomes entitled to the "property," in the chose in action, for such injury, and thus it is that the action concerns her separate "property" when brought to recover for such injuries. Assuming that the action concerns her separate property as before shown, the language of section 114 of the Code applies, that "when the action concerns her separate property she may sue alone." "May," as used, is equivalent to "must ;" she being vested with the right of action the husband is divested of the interest he would have had at common law. And as she is the person solely interested in the cause of action, section 111 of the Code applies and requires every action to be brought in the name of the real party in interest, to wit, *the wife*. The husband has no "property" or "interest" in the right of recovery for personal injuries to the wife. True he may have an action for loss of services in certain cases, but that is an independent cause of action in his favor and should not be joined with the distinct and independent cause of action in favor of the wife. The husband and wife are not united in interest in the same cause of action, and therefore section 119 does not apply, nor does section 117 of the Code apply.

These views lead to the conclusion reached by ALLEN, J., in *Mann agt. Marsh (supra)*, and a like order must be made sustaining the demurrer, with costs, "with leave to the wife, if she elect so to do, to amend by striking out the name of the husband and making the complaint conform to such change of parties and proceed in her own name on payment of costs" (35 *Barb.*, 74).

NOTE. — An appeal was taken by the plaintiff from the order sustaining the demurrer in this case, and the order was affirmed at general term in the fourth department in April, 1876. [Ed.]

Nason agt. Luddington.

N. Y. COMMON PLEAS.

EMILE NASON agt. BENJAMIN L. LUDDINGTON.

*Referees — when required to be sworn — in what manner oath may be waived —
Code of Civil Procedure, section 1016.*

The requirement of section 1016 of the Code of Civil Procedure, that "a referee, before proceeding to hear the testimony, *must* be sworn faithfully and fairly to try the issues, &c., unless the oath be *expressly* waived by written stipulation or orally, in which latter case the waiver *must* be entered in the referee's minutes," is directory merely, and may be waived by the acts and acquiescence of the parties to the proceeding.

Where the defendant and his attorney, both learned in the law, and with knowledge of the provision of this section as to the oath of the referee, voluntarily, and without objection, conduct the defense to an unsuccessful issue, which was followed by an acquiescence in the validity of the proceedings, as shown by an application for additional time to file exceptions to the report, and opposition to the motion for an extra allowance:

Held, that the defendant had waived his right to the statutory requirement as to the oath of the referee (*See The Exchange Fire Insurance Co. agt. Early*, 54 How., 279; *McGowan agt. Newman*, *id.*, 458).

Special Term, July, 1878.

Theodore Arnold, for plaintiff.

George W. Lord, for defendant.

LARREMORE, J. — This is a motion by the defendant to set aside the report of the referee herein, on the ground that he was not sworn to try the issues in pursuance of section 1016 of the Code of Civil Procedure. The action was referred by consent, and decided by the referee in favor of the plain-

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tiff. No objection was made as to his right to try the same until his report was made. Then the defendant, who is a member of the legal profession, and was present at the trial, called attention to the alleged omission, and subsequently obtained additional time to file exceptions to the report, opposed a motion for an extra allowance and obtained an adjournment of the taxation of costs.

By the section above mentioned, the referee is required, before proceeding to hear the testimony, to be sworn faithfully and fairly to try the issues &c., unless the oath be expressly waived by written stipulation or orally, in which latter case the waiver must be entered in the referee's minutes. In this case, there was neither a written stipulation nor entry in the minutes; and the question to be decided is, whether defendant's acts and acquiescence throughout the whole proceeding constitute a legal waiver of the referee's oath. If the requirement of the statute is mandatory, then all the proceedings before the referee are a nullity, for there could be no express oral waiver except by entry in the referee's minutes. But if the phraseology of the statute is directory, merely, then it is possible to conceive of an interpretation in harmony with its spirit, and recognized by adjudications in analogous cases.

In *Greason* agt. *Keteltas* (17 N. Y., 498) the defendant was entitled by right to a trial by jury, but waived it by entering upon a trial before the court without objection.

In *McKeon* agt. *See* (51 N. Y., 300) the defendant was entitled to a trial by jury, but claimed his right on an untenable ground, and the trial by the judge was sustained on appeal.

Bradley agt. *Aldrich* (40 N. Y., 509) is not in conflict with this theory. In that case the defendant had no alternative. The action was for pure equitable relief, and he was compelled to go to trial. He had no opportunity to object to the assessment of damages by the judge until it was made.

The authorities cited clearly establish that a constitutional

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right may be waived if not insisted upon (*See, also, Embury agt. Connor*, 3 N. Y., 518).

By analogy of reasoning, the defendant must fail in his motion. He and his attorney both learned in the law, and, with knowledge of the provision of statute as to the oath of the referee, voluntarily, and without objection, conducted the defense to an unsuccessful issue. This was followed by an acquiescence in the validity of the proceedings, as shown by an application for additional time to file exceptions to the report, and opposition to the motion for an extra allowance. In view of all the facts, I am inclined to the belief that the defendant has waived his right to the statutory requirement, which would seem to apply to a waiver before proceeding to hear the testimony.

The motion is denied, but without costs.

NOTE. — It would seem to us that if the requirements of section 1016, as to the oath of the referee and the oral waiver of such oath, be not mandatory, it would be impossible to put words into a statute to make it a mandatory one. The section provides that "the referee *must*, before proceeding to hear the testimony, *be sworn*," &c., &c. It then provides two modes in which the oath may be waived, one by *written stipulation*, the other orally. It further provides that "if the waiver is oral, it *must* be entered in the referee's minutes." There certainly could be no *oral waiver* in any other manner than by an entry in the referee's minutes. Another sentence of the section reads as follows: "But where all the parties, whose interests will be affected by the result, are of age, and present, in person or by attorney, they may *expressly* waive the oath of the referee." The word *expressly* is defined by all lexicographers thus: "*In direct terms, not by implication.*" According to this definition, there could be no *legal waiver by implication* (i. e.), by the acts of the parties in acquiescing in the proceedings. It will be observed that the word *must* is used in this section when speaking of the oath of the referee and of the oral waiver. Section 417, where the word *must* is used, as to what the summons should contain, has just been construed as *mandatory*, and a summons set aside on the ground that it did not contain the name of the county as required by that section. This is in accordance with our views as to section 1016 (*See Osborn agt. McCloskey*, post, 315).

Osborn agt. McCloskey.

SUPREME COURT.

FRANCIS P. OSBORN agt. A. T. McCLOSKEY and M.
McCLOSKEY.

Summons — what it must contain — Code of Civil Procedure, section 417.

The provisions of section 417 of the Code of Civil Procedure as to what the summons must contain are *mandatory*.

Where a summons is served in an action in the supreme court without naming the county where the plaintiff desires the trial to be had it will be set aside, on motion, as irregular and void.

Special Term, July, 1878.

THIS was an action brought to recover the sum of \$201.87 on a promissory note by the above-named plaintiff against the defendants.

The summons entitled as above was accompanied with the usual notice that on default to appear or answer, a judgment would be entered against them for the above amount, with interest from July 15, 1877.

The summons and notice were served on one Anna T. McCloskey at Bath Park, Long Island, on July 1, 1878, and an order was obtained in her behalf to set aside the summons on the ground that as it was an action brought in the supreme court and the plaintiff had not named any county wherein he desired the trial of the action the summons was irregular. The appearance indorsed on the papers being restricted to the motion only. The motion came on to be heard before Hon. CHARLES DANIELS at special term, in the city and county of New York, on the 26th day of July, 1878.

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E. M. Neville, for the motion, raised the objection that the summons was irregular and void, in that it did not contain the name of the county where the plaintiff desired the trial of the action as required by section 417 of the Code of Civil Procedure, it being an action in the supreme court, and that the words of that section are mandatory and that the omission was a jurisdictional defect and could not be cured by an amendment under section 723, Code of Civil Procedure; and although under section 128 of the Code of Procedure the requisite of the summons are set forth in seemingly permissive words, yet under the liberal system of amendments provided for by the one hundred and seventy-third section of that Code a summons could only be amended by leave of the court (*See Wait's Code*, 325 [edition 1871], and cases there collated).

Coudert Brothers, in opposition to the motion, claimed that the summons was regular and that the defect could be cured by amendment, and asked leave to amend by inserting the county.

DANIELS, J., sustained the view of the counsel for the motion, holding the words of the section to be mandatory, and set aside the summons.

Matter of Travis.

SUPREME COURT.

IN THE MATTER OF EMMA TRAVIS.

Form of commitment—Disorderly person—Record of conviction—what it must contain.

The jurisdiction of inferior courts and magistrates *must affirmatively* appear.

A statement that any act has been regularly or duly done is not sufficient; the preliminary steps must be stated so that it can be seen that all was due and regular. The liberty of the citizen cannot depend upon the declaration of the magistrate that he has done all that the law requires, but upon the actual performance of those duties.

In the absence of any proof showing a valid complaint, the issue of a warrant, the arrest of the prisoner, the bringing her before the magistrate, and the proceedings upon such arraignment, the prisoner cannot be detained upon the warrant which is returned as the sole cause and right of detention.

On *habeas corpus* to inquire into the imprisonment of a party for failure to give security as required by the act in relation to disorderly persons (2 R. S. [6th ed.], page 898) a commitment issued by a police justice which simply states that E. T. "has been duly convicted before me," &c., without stating any facts showing the conviction was duly had, is insufficient and the prisoner must be discharged.

The magistrate is required "to make up, sign and file in the county clerk's office a record of the conviction of such offender as a disorderly person, specifying generally the nature and *circumstances* of the offense."

A record of conviction in such case which does not show the arraignment of the prisoner, her confession or denial of the charge, the examination of witnesses in her presence, the nature and character of the testimony, and above all the *circumstances* of the offense, is defective and does not show that there has been a *regular* conviction as the warrant of commitment recites.

It is no compliance with the statute for the magistrate to use the language of the act and say that E. T. is a disorderly person, "or that she was and is a common prostitute," for that is a simple conclusion depending upon "the *circumstances*" which are not detailed.

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In describing the offense a mere compliance with the terms of the statute will not suffice. The *particular circumstances* which leads to the opinion of the magistrate must be set forth, and not the mere result or conclusion from them.

Albany Oyer and Terminer, July, 1878.

HABEAS CORPUS to inquire into the imprisonment of Emma Travis.

Mr. Hitt, for prisoner.

Mr. Hotelling, district attorney, for people.

WESTBROOK, J.—To the writ of *habeas corpus* issued in the above matter, the keeper of the Albany penitentiary returns, that he holds the said Emma Travis under a warrant of commitment issued by W. K. Clute, a justice of the peace and police justice, for a failure, on her part, to give security to keep the peace, upon her conviction of being a disorderly person. The warrant recites as follows: "Whereas, Emma Travis has this day been duly convicted before me, W. K. Clute, one of the justices of the peace in and for the city and county of Albany, and police justice of said city, upon the complaint, on oath, of John Domery, and upon the testimony of John Domery and Margaret Quirk, of being a disorderly person, for that the said Emma Travis was and is a common prostitute. And, whereas, upon such conviction, the said Emma Travis was by me required," &c.

The counsel for the prisoner objects to the sufficiency of the commitment because it simply states that Emma Travis "has been duly convicted before me," &c., without stating any facts showing the conviction was duly had. Nothing is better settled than that the jurisdiction of inferior courts and magistrates must affirmatively appear. A statement that any act has been regularly or duly done is not sufficient; the preliminary steps must be stated, so that it can be seen that all

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was due and regular. The liberty of the citizen cannot depend upon the declaration of the magistrate that he has done all that the law requires, but upon the actual performance of those duties. In the absence, then, of any proof showing a valid complaint, the issue of a warrant, the arrest of the prisoner, the bringing her before the magistrate, and the proceedings upon such arraignment, the prisoner cannot be detained upon the warrant which is returned as the sole cause and right of detention.

The prisoner, however, has not rested her case upon the simple warrant of commitment, but has produced the record of conviction, which was filed in the Albany county clerk's office, and claims that there has been no regular conviction, as the warrant of commitment recites. Her right to do so is unquestionable, for the *habeas corpus* act (3d R. S. [6th ed.], p. 878, sec. 3) provides: "The court or officer before whom the party shall be brought, on such writ of *habeas corpus*, shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal, or supposed criminal matter or not." In making such examination required by this section, the court must look at the record of the conviction which the statute (vol. 2, R. S. [6th ed.], p. 893, sec. 2) requires the magistrate to file. Tested by the statute, the pretended record utterly fails. The magistrate is required "to make up, sign, and file in the county clerk's office, a record of the conviction of such offender, as a disorderly person, specifying generally the nature and circumstances of the offense." What a record in a case like the present must contain, is very clearly set forth in *The People* agt. *Phillips* (1 *Parker's Crim. Reps.*, 95) by judge EDMUNDS. The one now produced does not show the arraignment of the prisoner, her confession or denial of the charge, the examination of witnesses in her presence, the nature and character of the testimony, and, above all, it fails to state what the statute

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requires, "the *circumstances* of the offense." It is no compliance with such statute for the magistrate to use the language of the act and say that Emma Travis is a disorderly person, "for that she was and is a common prostitute," for that is a simple conclusion by him depending upon "the *circumstances*," which are not detailed. Judge EDMUNDS, in the case above cited (*page* 104), has well said: "In describing the offense, a mere compliance with the terms of the statute will not suffice, for if a magistrate merely states the facts of the offense, in the words of the act, when the evidence does not warrant the conclusion, he subjects himself to a criminal prosecution (*R. agt. Thompson*, 2 *T. R.*, 18 ; *R. agt. Pearce*, 9 *East*, 358 ; *R. agt. Davis*, 6 *T. R.*, 171 ; *Ardry agt. Hoole*, *Cowp.*, 825). The particular circumstances which conduce the opinion of the magistrate must be set forth, and not the mere result or conclusion from them (2 *Rob. Jus.*, 546)." In announcing the decision that the prisoner must be discharged, it is proper that the court should also state that personal liberty must be carefully guarded. It is true that no false humanity should recklessly open prison doors and allow the criminal to go free, but it is equally true that summary convictions, under special statutes, should be carefully scrutinized, and should be upheld only when it affirmatively appears that all the guards of the law have been regularly passed, and legal requirements literally complied with.

There is no intent in the present case to unduly criticise the action of the magistrate. Perhaps all his steps were regular, and his conclusions just, but his record should have shown them to be so. The forms (it is due to him to say) of his commitment and record are those found in a well-known text-book ; but they are clearly bad, as we have endeavored to show, and cannot, therefore, be upheld.

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N. Y. SUPERIOR COURT.

THE NEW ENGLAND IRON COMPANY agt. THE NEW YORK
LOAN AND IMPROVEMENT COMPANY, impleaded.

Discovery of documents before trial—what the petition must show and point out to entitle a party to the order.

The application for a discovery of documents before trial should be denied in cases where it is clear that they may be produced on an examination, before trial, of an adverse party, under a *subpoena duces tecum*, when the object is only to prove circumstances as the foundation of relevant inferences, rather than a fact proximately probative of an issue. To entitle a party to a discovery of documents before trial, the party applying shall show, to the satisfaction of the court or judge, "the materiality and necessity of the discovery sought, the particular information which he requires, and that there are entries of the matters he seeks a discovery of" (*Rule 15*).

The New England Iron Company, in its suit against the Metropolitan Railway Company, for \$4,500,000 damages, for violation of a contract to furnish the iron for the elevated road, joined the New York Loan and Improvement Company as codefendant, claiming that the last-named company had aided and abetted the railroad company to commit the alleged breach of contract, the contract having been awarded finally to the Loan and Improvement Company. In the petition of plaintiffs for a discovery of documents before trial (alleged to be in the possession of the Loan and Improvement Company), it was claimed that these documents would prove circumstances of knowledge, motive and intent on the part of such company, showing that they knowingly ousted the plaintiffs from the benefit they would have derived from the performance of their contract.

Held, that the petition should be dismissed on the ground that it did not point to the places where the information sought for existed, nor describe the entries, excepting by stating the supposed effect as evidence rather than their intrinsic character.

Also, on the ground that it did not show any reason for resorting to this method of proof, either in expediency or necessity.

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Special Term, June, 1878.

F. J. Fithian, for plaintiff.

Alexander & Green, for defendant.

SEDGWICK, J.— The action is against the present defendant for aiding and abetting its codefendant to commit a breach of a contract between the latter and the plaintiff. On this motion it may be assumed that such an action lies, and that knowledge of the obligation of the parties and fraudulent intent are material to be proved against the defendant.

It has been found impossible to specify accurately the cases in which (in our practice) a party may have a discovery of documents before trial. In cases where it is clear that they may be produced on an examination, before trial, of an adverse party under a *subpoena duces tecum*, the application has been denied when the object was only to prove circumstances as the foundation of relevant inferences rather than a fact proximately probative of an issue; and the court has always to use discretion in reference to each application.

In the present case it is not argued that an officer of a corporation, a party to an action, may be compelled to produce books of the corporation in an examination before trial. The impossibility of securing testimony from the books in this manner, does not, however, show that in such cases a party has a general and absolute right to a discovery of their contents. The language of the Revised Statutes, the Code and the rule rather negative the idea of there being a general right, and the Code especially supposes that the right is to exist in special cases, which it requires the rules of practice to state. As yet the rules have not stated them. A consideration of the issues in this action, shows that the discovery is needed to aid the plaintiff to prove — not, on the statements of the complaint, the breach of plaintiff's contract or that the present defendant's contract supplanted plaintiff's contract,

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for these matters, if they exist, can easily be proved without this discovery — but to prove circumstances of knowledge, motive and intent on the part of the present defendant, *i. e.*, the discovery, may show that the defendant corporation knowingly ousted the plaintiff from the benefits they would have derived from a performance of their contract. Perhaps there would be facts shown relevant to the amount of damages. By Rule 15, the party applying shall show to the satisfaction of the court or judge, the materiality and necessity of the discovery sought, the particular information which he requires, and that there are entries of the matters he seeks a discovery of.

By this rule, and indeed the general reason of the thing, the necessity referred to is not the general necessity that exists for getting relevant testimony, but is a necessity peculiar to the case, of getting the information in this particular manner. This kind of necessity does not exist when it is probable that the information can be had by the usual and ordinary methods of subpoena for the trial, there being no danger shown that the evidence will be lost before trial; or some peculiar expediency should call for it. In no case, in my judgment, can the necessity be placed upon the information being wanted to prepare for trial. The matters looked after must be, in themselves, evidence in the cause, to the introduction of which the usual objections and exceptions are applicable.

The experience of judges under the prevailing practice is, I am sure, that when what is gained for proof actually used upon the trial is considered, with the futile experiments made upon a mistaken necessity that furnish no proof for the trial, the general result calls for the greatest caution in granting such applications.

Again, the rule requires that on the face of the petition there should appear at least a probability that the books or papers contain the information asked for. It is not enough that perhaps it may be found there and perhaps not. The rule further requires that the information wanted should be

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described in a particular, not a general, manner: First, in justice to the opposite party, to enable him to produce copies, make admissions, answer with accuracy the application, and to reserve from disclosure what he has a right to reserve; second, to guide the judge in making proper directions. At all stages of this proceeding it is supposed that the party knows what his action or defense is, and what testimony he seeks.

The present application says it is material to show and prove who and what persons were from time to time, at, before or after the execution of plaintiff's contract, officers, managers and directors of said corporation, the amount of the shares of stock held or owned by said managers, directors and officers, what interests they had in, and what relation they sustained to, the defendant and to the several construction contracts for constructing and equipping the railway, to show and prove the actions, resolutions and proceedings of the directors and managers of the defendant, in meetings assembled in respect to the making, execution and performance of the various contracts, and all the matters and things pertaining and relating thereto.

The application further says that the defendant has a book of the actions and proceedings of meetings of stockholders and directors and managers of the corporation. The present application does not embrace the matters which are alleged to refer to the ratification by the codefendant of the contract made with plaintiff. It is further stated that the present defendant's book of minutes contains entries in respect to the negotiation, execution and delivery of the construction contract between the defendants and of the sub-contracts for the performance and carrying out of the same, and various other matters pertaining thereto, the particulars of which are to the petitioners unknown; and further, that the book of minutes contains entries showing who and what persons were, from time to time, selected and chosen as officers, directors and managers of the corporation; that the defendant has books

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known as stock books, stock subscription books, stock ledger, stock transfer book, which show the amount and number of shares of stock of the company held by the directors, officers and managers of the corporation.

From these allegations, it clearly appears that the matters so generally stated are not, as stated, evidence in the cause. In each severable proposition matters are included which cannot be evidence. The probability is, that the greater part of the particulars involved, but not stated, are of this kind. The other particulars may or may not be evidence. The petition itself does not characterize any entry or document as to which it can now be said that it is admissible evidence. It may be guessed from the pleadings that the applicant supposes or believes that if there were an opportunity to examine all the documents, some part of their contents would show that individuals, being officers or stockholders, or the corporation itself, were greatly interested or intentionally acted in bringing about a breach of the alleged contract with plaintiff.

To accomplish this even would involve the defendant forced to exhibit books which it is probable he has a right to keep undisclosed. It is clear to me that the petition does not point to the places where the information exists, nor does it describe the entries, excepting by stating their supposed effect as evidence rather than their intrinsic character. The description that is given is consistent with their not being evidence in the action. Nor does the petition show any reason for resorting to this method of proof, either in expediency or necessity. The first impression is that the kind of evidence called for can be had abundantly outside of the discovery of the books, &c., and at least the petition does not show the contrary. In fine, the petition does not meet the requirements of Rule 15, and the application to dismiss it must be granted, with ten dollars costs.

Costello agt. Meade.

SUPREME COURT.

FRANCIS COSTELLO and another agt. ANTHONY MEADE and others.

Mortgage—Forged satisfaction thereof—purchasers in good faith relying upon the record—Estoppel—Laches.

A satisfaction-piece of a mortgage purporting to be executed by the mortgagee, properly acknowledged, was filed in the register's office and the mortgage was marked satisfied of record; afterwards the mortgage was assigned by the mortgagee to a *bona fide* purchaser for a valuable consideration; afterwards the premises, covered by the mortgage, were purchased by a person, believing from the records that the premises were discharged from the mortgage.

Held, that the assignee of the mortgage could not enforce his mortgage against the premises, in the hands of such innocent purchaser, upon an allegation that the signature to the satisfaction-piece was a forgery, he not having, as soon as he discovered the alleged forgery, taken steps to correct the record or to enforce his mortgage; and that others, through the silence and inactivity of the plaintiff, were justified in dealing with the property as though the mortgage was properly discharged.

When a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference, he shall be estopped from denying it (*Cornish* agt. *Abington*, 4 *Hurl & Norman*, 556).

Effect of laches considered.

Special Term, April, 1878.

ACTION for foreclosure of a mortgage.

F. G. Salmon, for plaintiff.

C. Elliot Miner, for defendant Meade.

I. R. Marvin, for defendant Pardy.

Costello agt. Meade.

VAN VORST, J. — A satisfaction-piece of the mortgage purporting to be executed by the mortgagee, the execution of which was acknowledged before a proper officer, was duly filed in the register's office on the 6th February, 1872, and the mortgage was marked satisfied on the record.

Afterwards, and on the 19th day of March, 1872, the mortgage was assigned by the mortgagee to the plaintiff for a valuable consideration, the assignees having no actual notice of the satisfaction on the record.

The defendant Meade afterwards purchased the mortgaged premises for a valuable consideration in good faith, believing *from the record* that the mortgage was satisfied.

The conveyance to Meade is dated 4th June, 1872. The rights of the defendant Pardy were afterwards acquired, as a mortgagee, in good faith and for a valuable consideration. It is claimed by the plaintiffs that the signature to the satisfaction-piece is a forgery and that the mortgage remains a lien and may be enforced out of the land covered thereby.

The evidence upon this subject is in direct conflict, and the question is left in some doubt and uncertainty as to whether or not the signature is genuine.

A decision either way involves witnesses in false swearing. The mortgagee testifies that he did not execute the satisfaction-piece and that the signature is a forgery. On the other hand a witness is produced who testifies that he was present and saw the mortgagee execute the paper, and went with him before the notary and saw him acknowledge its execution. The notary did not personally know the mortgagee, he relied upon an introduction to him at the time.

This evidence is indecisive, but the view I take of this case renders it unimportant to determine the question as to the genuineness of the signature. By the conduct and omissions of the plaintiffs, in so far as the defendants' rights are concerned, the satisfaction-piece must have the same effect as though it were genuine, and for the purposes of this action must be deemed to be such.

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Knowledge of the existence of this satisfaction-piece and the discharge of the mortgage on the record was brought to the plaintiffs as early as April, 1872. They took no steps either to enforce their mortgage by action or to correct the record, but suffered the record to remain as though the mortgage was well discharged. It has remained so for several years. The silence and inactivity of the plaintiffs justified others, acting in good faith and *relying upon the record*, in dealing with the property as though the mortgage was properly satisfied and discharged.

In so far as the defendant Pardy is concerned, whose rights were last acquired, the plaintiffs concede the equity of her claim that their mortgage should be postponed to her's. But the equity of the defendant Meade is denied upon the ground that the laches of the plaintiffs is not set up in his answer.

I do not think it was essential to the defendants' rights that such defense should have been interposed by the answer.

In law the laches of the plaintiffs, from the facts appearing upon the trial, should shield the defendant who otherwise would be damnified thereby.

The plaintiffs could have protected themselves and saved both defendants from loss by prompt and decisive action so soon as they learned of the existence of the satisfaction-piece. Their omission to move justified the defendants in believing that the premises were unincumbered by the mortgage. For if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference he shall be afterwards estopped from denying it (*Cornish agt. Abington*, 4 H. & N., 556, BRAMWELL, J.).

It cannot but be that the plaintiffs were under a positive duty, if they would preserve their rights under their mortgage, to have promptly interposed by appropriate action so that the record should not be allowed to mislead persons dealing in the usual way in good faith with respect to the land,

Costello agt. Meade.

and who were justified in relying upon the truthfulness of the record.

The failure of the plaintiffs to act leads to the conclusion that they themselves supposed that the mortgage was properly satisfied. The loss, therefore, if any, must fall upon the plaintiffs and not upon the defendants who are wholly innocent.

As to the defendant Meade the complaint must be dismissed, with costs; and as to the defendant Pardy it must be adjudged that her mortgage should have preference over the plaintiffs, and she should recover her costs of this action.

Markell agt. Benson.

SUPREME COURT.

URIEL MARKELL, administrator of ROBERT MARKELL, deceased,
agt. GEORGE E. BENSON.

*Examination of a party in his own behalf—when and when not allowed—
Code of Civil Procedure, section 829—Deceased person—Action by representative of.*

Action by administrator against defendant, a practicing physician, to recover damages for negligence in causing the death of testator by giving to him an overdose of morphia. On the trial the wife of the plaintiff and mother of the deceased, also a daughter of the plaintiff, and the plaintiff himself, were examined as witnesses in his behalf. The wife and daughter testified to the visit of the defendant to the deceased, and the incidents thereof, whilst the plaintiff, who had been present in the sick room when the defendant was in attendance, testified to an interview he had with the defendant when the latter was summoned to the house:

Held, that, under the provisions of section 829 of the Code of Civil Procedure, the defendant was entitled to be examined in his behalf to prove what had taken place at his interview with the deceased at the visit, during which the plaintiff claimed that the alleged fatal dose of morphia was left with directions to be taken if the pain of the patient returned.

When the plaintiff testified to a conversation between him and the defendant which related and referred to the transaction between the deceased and the defendant, upon which the case turned, he gave evidence "*concerning the same transaction or communication*" upon which the defendant was subsequently examined.

Evidence of admissions as to what took place at a certain time *concern* the transaction to which they refer. The language of the section does not limit the examination of a party in his own behalf to the solitary case when his opponent had detailed the events of a transaction or communication from personal knowledge because present thereat, but permits him to be examined "*concerning a personal transaction or communica-*

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tion between the witness and the deceased person," when the * * * administrator * * * is examined in his own behalf * * * *concerning* the same transaction or communication.

Where the wife of the administrator is allowed to testify concerning a personal transaction or communication between the deceased person and the defendant, the defendant should also be allowed to be examined in his own behalf concerning the "*same transaction or communication.*" Section 399 of the old Code commented on, and a nice distinction drawn between that section and section 829 of the Code of Civil Procedure.

Special Term, 1878.

MOTION by plaintiff for a new trial upon the judge's minutes.

Mr. Chace and *Mr. Cady*, for plaintiff.

Mr. Esselstyn and *Mr. Delamarter*, for defendant.

WESTBROOK, J.—Upon the trial of this cause at the Columbia circuit, in October, 1877, a verdict was rendered for the defendant, which the plaintiff moves to set aside for the alleged error of the judge in the admission of evidence.

The action was brought to recover damages flowing from the death of Robert Markell, which was alleged to have been caused by giving to the deceased an overdose of morphia, by the direction of the defendant. The deceased, on the 29th day of August, 1876, was taken sick with bilious colic, and the defendant, a practicing physician in the city of Hudson, was called to attend him. A hypodermic injection of morphia was administered, and a dose of the same substance left to be taken at 7 o'clock P. M. On the succeeding day (August 30, 1876) the defendant again visited deceased and gave a second hypodermic injection of morphia, and the plaintiff claimed that defendant also left a dose of morphia of from three to five grains and contained in a blue paper, with directions to administer the same if the pain of the deceased returned. The plaintiff further claimed that about

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9 o'clock of that night such pain having returned, in conformity with the directions of the defendant, the morphia was given, and in consequence thereof the deceased died about 3 o'clock of the morning of August 31, 1876. The defendant denied that he had left any morphia to be taken on the thirtieth, and also insisted that the death was not the result of morphia.

On the trial of the action the wife of the plaintiff, and mother of the deceased, a daughter of the plaintiff, and the plaintiff were examined as witnesses in his behalf. The wife and daughter testified to the visit of the defendant to the deceased, and the incidents thereof, whilst the plaintiff, who had been present in the sick room, when the defendant was in attendance, testified to an interview he had with the defendant when the latter was summoned to the house on the morning of the thirty-first, as follows: "On the way to the house, he said, 'what have you given or have you done?' I replied, 'We have given the powder you left.' He replied, 'I left no powder, nor did I give directions to give him any.' I answered, 'You surely did, doctor.' He did not contradict this. He said, 'I fear there is a great mistake about this powder, I missed it between three and four yesterday afternoon and I supposed I had lost it.' I replied, 'It is a pity, doctor, that you did not retrace your steps.'" After this evidence had been given the defendant was offered, as a witness in his own behalf, to prove what had taken place at his interview with the deceased on the thirtieth, the visit during which the plaintiff claimed that the alleged fatal dose of morphia was left with directions to be taken if the pain of the patient returned, and was objected to on the part of the plaintiff under section 829 of the Code of Civil Procedure. The objection was overruled and the party was sworn and examined as a witness and emphatically denied that during that attendance upon the deceased he had left any morphia to be taken by him. It is claimed that the admission of this evidence was erroneous.

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The section of the Code upon which the objection is based declares that "a party * * * shall not be examined as a witness in his own behalf or interest * * * against the * * * administrator * * * of a deceased person * * * concerning a personal transaction or communication between the witness and the deceased person, * * * except where the * * * administrator * * * is examined in his own behalf * * * or the testimony of * * * the deceased person is given in evidence concerning the same transaction or communication." It was held at the circuit, first, that when the plaintiff testified to a conversation between him and the defendant which related and referred to the transaction between the deceased and the defendant, upon which the case turned, he gave evidence "concerning the same transaction or communication" upon which the defendant was examined. Evidence of admissions as to what took place at a certain time *concern* the transaction to which they refer. The language of the Code, it seems to me, does not limit the examination of a party in his own behalf to the solitary case when his opponent had detailed the events of a transaction or communication from personal knowledge because present thereat, but permits him to be examined "concerning a personal transaction or communication between the witness and the deceased person," when "the * * * administrator * * * is examined in his own behalf * * * *concerning* the same transaction or communication." The second ground upon which the evidence was received was this: By section 830 of the Code, then in force but now repealed, the husband or wife of the party offered was also excluded whenever the party was excluded by the previous section. This provision, it was held, was equivalent to a declaration that all the provisions of section 829 were applicable to both husband and wife, and that it was based upon the well known maxim of the common law that "husband and wife are one person." If one could not be examined when the other could not, it would seem, from the

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spirit and reason of this section, founded as it was upon the unity of their persons, that when either could be called and was called, then the mouth of the opposite party was opened in regard to the same transaction or communication concerning which either had given evidence. Any other construction of the Code would, it seemed to me, work most manifest injustice. We then argued that the reason for the exclusion of the evidence of the party was, that he ought not to be allowed to manufacture a case, or a defense, against a dead man's estate by proving a transaction or communication with one, whose lips were closed. If, however, the representative of the deceased person gave evidence concerning the transaction, then the party could speak; but if the husband or wife, as the case might be, of his opponent, who was really "one flesh" with the person to the record could testify, and the opposite party be still compelled to remain silent, then the precise evil was done to the living party, from which the section was designed to shield the dead one, which was that as the dead could not contradict the living party, the latter must also remain silent, unless justice to him required that he should be heard in regard to a transaction concerning which the representative of the dead had knowledge and had been heard. Then when the representative of the dead has spoken, very properly, as the reason for the exclusion of the evidence ceased, the exclusion itself ceased to be operative. If then the representative of the dead has personal knowledge of a transaction or communication between such deceased and the opposite living party, and either by his or her own words, or those of one who with the other make "one person," is heard as to the details thereof, no sound reason exists to exclude the evidence of the opposite party. His antagonist has been heard, the reason for his exclusion has ceased to operate, and if excluded, a statute designed to secure silence by the interested living party against the dead, only when the latter cannot be heard through his or her representative, has been so construed that the living cannot

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be heard in his own defense when the reason for his exclusion no longer exists, and when the representative of the dead has been fully heard upon the same subject. Is the law so unjust, and does any iron rule of construction compel the court so to hold? It was thought otherwise upon the trial, and that opinion remains unchanged.

For these two reasons, which were stated upon the trial, the defendant was allowed to be examined. The conclusion was hastily formed; but, though it has been carefully since considered, and without, as we hope, any desire to sustain an erroneous ruling, our conviction remains that it must be adhered to. In this case, the wife, who was the *alter ego*, the other self of the plaintiff, and his daughter, who were also the mother and sister of the deceased, have testified that the defendant left the morphia to be administered. This was supplemented by the evidence of the plaintiff himself, who, whilst not professing to detail the transaction between the deceased and the defendant as he witnessed it, undertook to give a conversation with the defendant "concerning" it, in which, without swearing directly that the defendant left the morphia with directions for its being taken, he does swear that he so asserted the fact and the truth to be, and that defendant did not contradict it. To have refused the defendant the right, under such circumstances, of being heard, was, it then seemed to me, and still seems, a simple and unadulterated perversion of justice; and he was accordingly permitted to narrate the events of August 30, 1876, concerning which the whole family of his opponent, and the opponent himself, had given evidence.

Upon the present argument, however, a recent case in the court of appeals (*Chadwick agt. Fowler et al.*) is referred to as overruling one of the grounds (the first) upon which the evidence was admitted, and the new argument founded thereon will now be considered. In that case, according to the manuscript opinion furnished, certain declarations of the plaintiff were proved by the defendant, as to what plaintiff

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had agreed with a deceased person to give for certain land. The plaintiff was then called, and was allowed to answer this question: "Did you ever agree to pay thirty dollars an acre for that land?" The court of appeals held that this evidence was improperly received. The case referred to does not present the question of the admissibility of the evidence, because the wife of the opposite party had testified in regard to the same communication, and is also unlike the present for two reasons:

First. The objection was founded upon section 399 of the old Code and not upon section 829 of the new. By the former the prohibition did not "extend to any transaction or communication *as to which* any such * * * administrator * * * shall be examined on his own behalf." There is a difference between the examination of a witness "as to" a transaction and the giving of testimony "*concerning*" it. The former involves the knowledge of the witness of its details, whilst the latter may or may not do so. The Code as it now is (*sec.* 829) and as it was at the time of this trial allowed the party to be sworn against the administrator when the latter had been "examined in his own behalf * * * *concerning* the same transaction or communication." Treating the language of the present section literally, as the justice of this case requires, the conclusion at the circuit is adhered to, that when the plaintiff gave evidence of the conversation between himself and defendant, which conversation purported to unfold and develop the occurrences at the interview between the defendant and the deceased, he gave evidence "*concerning* the same transaction or communication," in regard to which the defendant was subsequently examined.

Second. In the case decided in the court of appeals, so far as the opinion discloses, there was no attempt by the witness, under the guise of proving admissions by the plaintiff, to put in evidence his own version of the original transaction with the deceased, which he witnessed, by assertions made to the plaintiff of the events and conversations which then trans-

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pired. In this the plaintiff declares and iterates to the defendant his own declarations as to the very pith and marrow of the transaction. He swears he told the defendant, "We have given the powder you left;" and when the defendant denied leaving a powder, or giving directions to have any taken, the plaintiff again asserts: "You surely did, doctor." The manifest effect of this was to give the plaintiff the benefit with the jury of his version of the turning and crucial point of the case. The cause depended upon the fact whether the defendant had or had not left the morphia to be administered, and the plaintiff gave to the jury his solemn assertion to the defendant that the medicine had been left and the same was taken by his orders. Under such circumstances to allow the defendant only to deny the plaintiff's statement contained in his evidence and that given immediately after, as follows, "he did not contradict this," would still leave with the jury the truth of the fact embodied in the positive statement of the plaintiff undenied by the oath of the defendant. To the mind of the ordinary juror, the declarations of the plaintiff as to the occurrences of August 30, 1876, made in the presence of and to the defendant, would carry substantially the same weight as his narration of them under oath. As the plaintiff had the full benefit of his version of the transaction upon which the result of the action depended, the defendant was allowed to deny, under oath, the truth of the facts contained in the declarations made to him by the plaintiff, and proved to have been so made by the latter's own examinations in his own behalf. Unless this had been allowed, the denial of the defendant was imperfect and incomplete, the assertion of the plaintiff that the defendant was guilty of the very negligence imputed remained uncontradicted, and the defendant's version of the occurrences at the interview of August 30, 1876, without the benefit of which the full force of the conversation with the plaintiff to which the latter had testified, could not be appreciated, would not have been given. As the claim of the family, who were the parties interested, had been supported by their testimony

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disclosing the transaction in question, it seemed but reasonable to allow the defendant to speak as to the same point in his defense. To have held otherwise was to bind him hand and foot and deliver him over to his adversaries. This did not then accord with our views of justice and the law, and of that opinion we still remain.

The motion for a new trial is denied.

Westervelt *et al.* agt. Radde.

N. Y. COMMON PLEAS.

JOSEPH H. WESTERVELT *et al.* agt. WILLIAM RADDE and DANIEL
M. KOEHLER, impleaded.

Corporations—official powers of president.

The president of a corporation cannot bind it for goods purchased by him, and required in its business, where there is a resolution upon the books of the corporation forbidding such officer from making such purchases.

The official powers of a corporation defined.

General Term, November, 1877.

APPEAL from an order of the general term of the marine court affirming a judgment entered against the defendants, upon a decision made by Mr. justice McADAM at the trial term of that court, wherein that justice (*upon the authority of 10 Wallace, [U. S.], R., at p. 644; 68 North Carolina Reps., 107; 33 Barb., 336; Field on Corporations, sec. 194, and cases cited*) made the following ruling: "I hold that the president of this corporation could lawfully bind it in the purchase of goods required in its business, notwithstanding there was a resolution to the contrary on its books, unless the plaintiff had notice of such resolution." The trial judge also admitted oral and written declarations of Bock, the president, relating to the subject-matter of the action.

The common pleas, on appeal, has reversed these rulings in the following opinion:

John A. Foster, counsel for appellant.

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John P. Reed, counsel for respondent, cited 10 *Wallace, United States Reports* at page 644; 68 *North Carolina Reports*, 107; 33 *Barbour* 336, and claimed that as to innocent third persons, the apparent authority of the company's chosen representative was the real authority.

ROBINSON, *J.* — Plaintiffs sued the appellants Radde and Koehler and two others as trustees of a corporation formed under the general manufacturing act of 1848, known as the "Paragon Match Company," for goods sold and delivered that company between May 29 and June 27, 1872, by reason of the alleged failure of the company to make and publish the report required by the twelfth section of that act. The company was organized in April, 1872, with seven trustees including the two defendants. The by-laws prescribed that no officer, trustee or employe should have power to incur any debt unless authorized by the board of trustees by resolution entered in its minutes. The company was intended to succeed to the business of "Boch, Schneider & Co.," match manufacturers, whose assets and good will were purchased and were to be paid for, part in stock and part in cash derivable from sales of stock. It was also resolved, by resolution passed May fourth, that the company should not commence actual operation before 4th of May, 1872, nor until an amount deemed sufficient for the successful commencement of operations should be in the hands of the treasurer. The company was organized in June, and Mr. Boch, one of the trustees, was elected president. At a meeting held by five of the directors in the early part of December, 1872, all of them, including these defendants, resigned. The default charged was for not making the report required by the act of January, 1873. The judge before whom the cause was tried upon the proof tending to show a sale and delivery of the goods for which the action was brought upon the order of said Boch, held against objection and exceptions, "That the president of such a corporation could lawfully bind it in the purchase

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of goods required in its business, notwithstanding there was a resolution to the contrary on its books, unless the plaintiff had notice of such resolution." Boch, the president, had as a member of the firm of Boch, Schneider & Co., Boch, Zenier & Co., and until such assumed organization, purchased goods of plaintiffs, and he expressly swore plaintiffs refused to give credit to the company. The refusal of the judge, therefore, to submit to the jury the question of the sale and delivery of all the goods for which claim was made was erroneous; the judge also erred in holding "that the president of such a corporation could lawfully bind it in the purchase of goods required in its business notwithstanding a resolution to the contrary on its books, unless the plaintiffs had notice of such resolution."

As president he was but presiding officer of the board of trustees; the concerns of the company were to be managed by the trustees, who were to be, by the articles of incorporation, "not less than three, nor more than nine." The authority to contract a debt or transact any other business of the corporation, except such as they specifically authorized by resolution or by-laws, must grow out of some delegation of their authority, either by by-law or resolution, or through a well recognized general course of dealing, by which some person has been permitted and held out by the corporation as possessed of authority to transact its business (7 *Wend.*, 31; 1 *Hun.*, 202; 3 *Bosw.*, 600). Under the views previously expressed, various other errors occurred in the admission of improper testimony, in admissions made by Boch, personally and in writing. The status of the defendants when the alleged default of the corporation occurred, as two out of seven trustees, fixed in numbers by the articles of incorporation, was admitted by their answers. No questions arising out of their previous resignation, as well all the others of the trustees, or as to their power as a minority of such, as was required by the articles of incorporation, to transact any business of the corporation, or as to their exemption from

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responsibility by reason of any incapacity in the corporation to make the report because of the resignation of the majority of the trustees, or the effect of their subsequent abortive attempt to cause such report to be made, were properly presented on the trial, and if deemed material, must be made the subjects of consideration on a future occasion.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event.

LARREMORE and J. F. Daly, JJ., concurred.

Kelstadt agt. Reilly.

SUPREME COURT.

MICHAEL KELSTADT and another agt. BERNARD REILLY,
sheriff, &c., *et al.*

Attachment—Voluntary assignment under laws of another state—precedence.

A voluntary assignment under the laws of Ohio takes precedence of a fund in this state, as against a subsequent attachment instituted at suit of creditors.

Special Term, May, 1878.

E. R. Meade, for plaintiffs.

E. Terry, for defendants.

VAN BRUNT, J. — The defendant in this action claims that the assignment, which is the foundation of the plaintiffs' title to the fund in suit, did not transfer the title to the fund because it was made pursuant to the insolvent laws of Ohio. Fortunately it is not necessary for us to discuss the question as to whether the laws of Ohio, under which this assignment was made, are insolvent laws or not. In the case of *Meyer agt. Hellman* (1 *Otto*, 496) the supreme court of the United States referring to the statute of the state of Ohio used the following language: "There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment. It leaves him after acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision."

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The case of *Kelly agt. Crappo* (45 N. Y., 86) simply holds that a title acquired under foreign bankrupt or insolvent proceedings will not prevail over the lien of creditors attaching, under our own laws, property found here; and expressly recognizes that a voluntary conveyance, valid under the laws of the state where the owner resides, will operate to transfer personal property wherever situated. Story in his *Conflict of Laws*, in section 398 and the following sections, recognizes the same principle and cites many cases in its support.

It follows, therefore, that the assignment under which the plaintiffs claim, not having been made under an insolvent law of the state of Ohio, transferred all the property belonging to the assignor in this state and gave to the plaintiffs a title superior to that of any subsequent attaching creditor.

The plaintiff is entitled to judgment, with costs.

Marsullo agt. Billotto.

N. Y. MARINE COURT.

BENEDIOT MARSULLO agt. JOHN BILLOTTO.

Costs—Disbursements—Action for malicious prosecution.

In an action for malicious prosecution, where the plaintiff recovers a verdict for six cents damages, he is entitled to six cents costs, but is not entitled to disbursements.

*General Term, May, 1878.**James Henderson*, for plaintiff.*G. L. Simonson*, for defendant.

MOADAM, J.—The plaintiff recovered a verdict of six cents damages in an action for malicious prosecution, and became entitled to six cents costs (*Code of Pro.*, sec. 304, subd. 4; *Laws of 1875, chap. 479, sec. 45, subd. 4*), which sum includes (within it) the only disbursements the plaintiff is entitled to receive (*Peet agt. Worth*, 1 Bosw., 653; *Belding agt. Conkling*, 4 How., 196; *Wheeler agt. Westgate*, id., 269; 1 *Code Rep. [N. S.]*, 233; *Stone agt. Druffy*, 3 Sandf., 761; 4 How., 52; 12 Hun, 383). In *Lurtgies agt. Kelly* (*Daily Register, January 28, 1874*) this court at special term correctly held “that there is no statute entitling a plaintiff to disbursements who is not entitled to full costs,” citing 1 Bosworth, 653 (*supra*). Indeed, the matter is too well settled to be open to dispute. The special term judge was clearly wrong in disturbing the clerk’s taxation, which was in strict accordance with the settled practice, and his order must, therefore, be reversed, with costs, and the clerk’s taxation allowed to stand as hereby affirmed.

SHEA, J., concurred; SINNOTT, J., dissenting.

Myer agt. Whitaker.

SUPREME COURT.

AMANDA M. MYER, survivor, &c., agt. E. G. WHITAKER and
J. FINGER.

Water — property in — Right to dispose of ice made from waters of a pond.

The ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. This right of use which may be to propel machinery, for domestic purposes, for sale and for hire, is *property* of which the owner cannot be deprived.

So long as owners below are not interfered with a party who is the former and owner of the pond or basin which holds the water has the right to use such water for his own profit. He can use its momentum to propel machinery and let that right to others; he can use the water for domestic and farming purposes, and can let, rent and sell that right to others.

The right to use and to sell the water in its *liquid form* is only a part of his right. The *ice* made from the waters of the pond is so far the absolute *property* of the owner of the pond that he can sell or dispose of it as he could the trees or timber on his farm.

The case of *Marshall* agt. *Peters* (12 *How.*, 218) commented on, and the doctrine therein announced dissented from.

One S., at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part which belonged to O. O., by deed, conveyed to the grantor of S. "the right, privilege and liberty to overflow so much of the said lands above mentioned as are now, or at any time after may be, overflowed by means of the said dam, or by any other dam which may be erected in place of said dam." In February, 1876, M. and R., of which the plaintiff is the survivor, purchased all the ice in the pond, formed or to be formed, from S. Previous to the gathering of the ice from the pond a freshet occurred which carried out of the pond a large part of the ice formed therein and loosened that which is in controversy in this action from the shore, and would probably have swept this out also had not plaintiffs, by holes cut therein, fastened it to the shore and thus detained it. After plain-

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tiffs had commenced to remove and gather the ice, the defendants went to the part of the pond, over O.'s lands, by permission of O. and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which S. had title, and floated the ice, so cut by them, through such canal or channel, and gathered and sold the same.

Held, that, an action for the recovery of the value of the ice so taken, could be maintained upon the ground alone, of the abstract right of the plaintiffs, obtained by the purchase from S.

Held, further, that, as after purchase the plaintiffs had, by their own exertions, saved the ice from being lost by anchoring it to the shore, and by labor performed thereon, they were in actual possession when the defendants took and converted it, and are, therefore, entitled to recover.

Ulster January Circuit, 1878.

Peter Cantine, for plaintiff.

Theodore B. Gates, for defendants.

WESTBROOK, J. — This action, which was one for the recovery of the value of certain ice taken from a pond caused by a dam across the Esopus creek, in the town of Saugerties, Ulster county, was a trial by the court without a jury. On such trial the following facts were established:

The Esopus creek is a natural running stream of water emptying into the Hudson river, at Saugerties, aforesaid. About the year 1826 or 1827, a dam twenty-eight feet in height was built across it and has ever since been maintained, which ponds and flows back the waters of the stream. One Joseph B. Sheffield, at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part thereof, which belonged to the Overbagh family. That family, however, by deed dated April 24, 1841, for the consideration of \$5,750, had conveyed to the grantor of Sheffield "the right, privilege and liberty to overflow so much of

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the said lands, falls and water privileges above mentioned as are now, or at any time hereafter may be, overflowed by means of the said dam across the Esopus in the year above mentioned, or by any other dam which may be erected in place of said dam." The recitals in the deed show that the dam was erected during the years 1826 and 1827, and the waters by means thereof had overflowed the lands of the grantors, and rendered valueless to them certain falls in the stream.

In February, 1876, the firm of Myer & Rosepaugh, of which the plaintiff is the survivor, purchased all the ice in the pond, formed and to be formed — there being some reservations which are not material to be stated — from Joseph B. Sheffield.

Previous to the gathering of the ice from the pond, a freshet occurred in the Esopus creek, which carried out of the pond a large part of the ice formed therein, and loosened that which was in controversy in this action from the shore, and would, probably, have swept this out also, had not the plaintiffs, by holes cut therein, fastened it to the shore and thus detained it.

Ice during the winter of 1876 was comparatively scarce and valuable. The plaintiffs had a contract for all the ice in the pond at one dollar and seventy-five cents per ton stacked, and the cost of stacking and cutting was about half that sum, leaving a profit of eighty-seven and a-half cents per ton.

After the plaintiffs had commenced to remove and gather the ice, the defendants went to the part of the pond over the Overbagh lands, by permission from such family, and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and over that part of it which was upon the land to which Sheffield had title, and floated the ice so cut by them through such canal or channel, and gathered and sold the same in the New York market. For the value

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of the ice so taken by the defendants a recovery is sought in this action.

As the firm of Myer & Rosepaugh, of which plaintiff is the survivor, claims under a purchase from Joseph B. Sheffield, the first question which this case presents is: What right of property, if any, did Sheffield have in the ice cut and removed by the defendants? The water from which the ice was formed was ponded and gathered by him for his own use. He owned the dam which ponded and held them, which was located upon his own property. All the land under the water of the pond was his, except a small part thereof owned by the Overbagh family, and upon and over that part of the land he held, by purchase, as the owner thereof, the right to flood and to hold the water. In a basin then, formed mostly out of his own land and in part out of the land of another, the right to use which for that purpose had been purchased for a valuable consideration from the owner, Mr. Sheffield had gathered a large body of water for his own use and benefit. The manner of its use and the mode of its application to his own use, was not restricted by any deed, conveyance or title which he held, nor by any rule of law except the general one, that the flow of a natural stream shall not be so obstructed as to deprive owners below of the beneficial use and enjoyment of the stream and its flow. So long as such owners below were not interfered with, Mr. Sheffield, as the former and owner of the basin which held the water, had the right to use such water for his own profit; he could use its momentum to propel machinery and let that right to others; he could use the water for domestic and farming purposes, and could let and rent that right to others. All these consequences follow, it seems to me, from his act of appropriation and gathering them. The land, basin or vessel which held them, was his as owner in fee or as owner for use. By his dam he had filled that basin or vessel, and the water thus gathered or held therein was his, subject only to the exception that the beneficial enjoyment of owners below should not be inter-

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ferred with, just as much as if he had gathered them for his own use and benefit into a tank or cistern which had been constructed for that purpose. The right to use and to sell the water in its *liquid* form is only a part of his right. When the form of the water changed by cold into *ice*, Mr. Sheffield had, it seems to me, the right to use it in its congealed form, and the same right to sell it and permit it to be gathered before it returned to its liquid state, as he had to use and dispose of when in the latter condition. There can be no difference as to his rights growing out of the state of the water. All this appears so elementary and clear, and so plainly deducible from principles long established as to be scarcely worthy of argument, were it not for the case of *Marshall agt. Peters* (12 How. Pr. R., 218), upon which the defendants rely. In that case, which was very similar to this, judge EMOTT, for whose learning and integrity I have a profound respect, held that the party purchasing ice from the owner of a pond, could not have an injunction against a trespasser who undertook to remove it. If the refusal to allow the injunction to continue had been put upon the ground that the plaintiff had an adequate remedy at law, and the insignificant value of the ice in controversy, the decision would not apply to the case before us. The learned judge, however, goes further and states principles and reasons for his conclusions, which, if they are sound, control this cause. Examination and reflection compel me to dissent from the opinion rendered in the case cited, and the reasons therefor will now be stated.

The judge (*pages 222, 223*), says: "But it is quite as far from being true, that Mr. Lent is the owner of the water in this pond, or that it, or the ice formed from it, is his absolute property. The water in a running stream can never become, in any such sense as was claimed on the argument, the property of a riparian proprietor even if he owns both banks and the stream passes through his lands. All the property that a man can acquire in flowing water is a right

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to its use. He may have a certain right of property in it, but the water itself is not property. He has a right to its natural flow and to use it for his cattle or his household, or upon his mill-wheels. But he cannot stop its current nor direct its flow, nor increase or diminish it in any appreciable quantity. He must allow the waters to pass out of his hands as they enter them, and his only right is a right to use them as they flow."

The error, with deference it is said, which the learned judge makes, is the overstatement of a general proposition and the want of a proper application of certain qualifications, the existence of which he recognized, to the general rule which he asserts and upon which his decision is founded. It may be true, as he says, that the possessor of the mill-pond is not the "owner of the water," and that the same is not "his *absolute* property," provided, the judge means that the owner of the pond does not own absolutely and exclusively *all* the water therein. This, of course, must be true, for if it were not the riparian owner above could use the entire water of the stream, and thus prevent its natural flow and beneficial enjoyment by the owners below. It is also, however, true, and this the judge admits when he says, "he may use it for his cattle or his household, or upon his mill-wheels," though he fails to give it weight, that the owner has the absolute property in the use of the water as it flows, not only in the application of its momentum, but also in its removal from the stream for consumption, provided, the usefulness of the stream to the owners below is not impaired. And it follows from this concession, because it is one of the rights of absolute property, that if such ownership as has been described is in one man, that he may convey the right he thus owns to another, the buyer taking it with the same limitations, that the title which he acquires to the water—liquid or solid—is subordinate to the rights of owners below, which must not be interfered with. To this extent then, there is absolute ownership in water—or its use, if that expression be pre-

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ferred — which the learned judge concedes. Having made this concession, it seems to me that his statement, that there can be no “absolute property in the water of a pond, ‘or the ice formed from it,’” is too broad if applied to all the water, and is not limited in meaning, as the judge, in his general argument, seems to admit. It is too broad because the right to use the water for domestic purposes, or to sell it for his own profit, and take it from the pond, and from the general flow for these purposes, subject only to the exception in favor of owners below, before stated, being conceded, it follows that the owner has some absolute property in the water — in its normal state or when frozen — which he needs, and which is capable of being enforced against one, who, without right, deprives the owner of its use or of his gains from a sale. If as against such owner and his needs, the stranger can take some, he may take all, and the ponder of the waters would have no rights which the law can protect. If the judge had borne more clearly in mind the extent of absolute property in water which may exist, and of his concessions, he could not have held that the congealed water, which the owner needed for his own profit, and which did not interfere with the natural flow of the stream, nor with the beneficial enjoyment thereof by riparian proprietors below, could be removed by a mere naked wrong-doer at pleasure. This conclusion I regard as unsound, and is entirely at war with other adjudications and principles which will now be referred to.

In *Mill River Wollen Manufacturing Company agt. Smith* (34 Conn., 462) it was held: “That owners of the waters of a mill pond, *own the ice formed upon it*, and the riparian proprietors had no right, as owners of the soil, to remove it.”

In the *State agt. Pottmeyer* (33 Indiana, 402; also reported in *5th American Reports*, 224) it was held: “When the water of a flowing stream, running in its natural channel, is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and has the right to prevent its removal.” This case is worthy

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of attention, because it was most carefully considered and elaborately discussed. It had been to the supreme court of Indiana once before, upon the quashing of the indictment. The court then held the indictment good, because the ice might have been taken from a pool upon the land of the owner, and therefore refused to consider or decide whether there could be property in ice formed in a running and unnavigable stream. Upon the trial of the indictment, the court below held there could be no property in ice formed in a running stream. The court above held the contrary, and reversed its judgment (*See an article upon this case in Albany Law Journal, vol 3, page 386*).

In *Elliott agt. The Fitchburgh Railroad Company* (10 *Cushing*, 191), in *Brown agt. Brown* (30 *N. Y.*, 519) and in many other cases, it has been held that the ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. The effect of this doctrine, which is identical with that stated in the beginning of this opinion, is, that this right of use, which may be to propel machinery, for domestic purposes, for sale and for hire, is property of which the owner cannot be deprived by a mere wrong-doer. If owners below are interfered with, they will be protected against the improper or wasteful use of the water by the owner above, but as against all others who are strangers to those rights, the owner of the pond will be protected in the enjoyment of the use of the water, whether it be carried to his mill to propel his machinery, to his house, or barn for consumption, or to the property of others to whom he sells or lets it for like use, and this right of use of the water is without regard to its state or condition. It might as well be said that its use is confined to the frozen state entirely, as to say it is confined to the liquid solely. This principle, so long and well settled, must control this cause.

The only seeming difficulty which this case has presented to my mind, grows out of the fact that the ice in controversy was taken from that part of the pond which was above the

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lands of the Overbagh property, the owners of which gave permission to the defendants to do the acts complained of. Reflection, however, satisfies me that this fact cannot prevent a recovery, because,

First. The defendants not only removed ice from that part of the pond which was upon the Overbagh land, but against the forbidding of the plaintiff they cut a channel across the entire pond, thus removing and destroying ice which was formed in that part of the pond which was upon the Sheffield property, and for the ice thus destroyed at least there must be a recovery.

Second. By the conveyance of the Overbagh family, the right to flow back the waters, and hold them in the pond for the benefit and use of the owner thereof is transferred, and that right Mr. Sheffield now has. There was no limitation whatever upon the use to which the pond could put the waters, nor any reservation whatever to the Overbagh family in the water. In short, the effect of the Overbagh deed was to enable the owner of the right, by a dam, to make a large basin to hold water for his own use and purposes. Whatever rights, if any, which the Overbagh family had, or retained in the water, were subordinate to those of the owner of the right to pond. Being subordinate to those rights, the owner of the pond having need of so much thereof as was frozen, and such use being consistent with his ownership, as we have endeavored to show, no act or consent given by any of the Overbagh family could deprive the owner of the ponded water of the use to which he had applied it. This very principle is decided in *Mill River Woolen Manufacturing Company agt. Smith* (10 Conn., 462), before cited, in which it was held that the owner of the pond as against the owner of the land, could prevent the removal of the ice. If it can be done because the owner needs the water in its liquid form, it can be done when the owner requires and needs it in its congealed form. The right to pond being for an unspecified purpose, its right of use and its manner of use depend upon

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the needs of the owner, to which all other rights are subordinate.

The cause has thus far been considered upon the abstract right of the plaintiff obtained by the purchase from Sheffield, and our conclusion is that the action can be maintained upon that ground alone. There is, however, another view which is worthy of attention. After the purchase, Myer & Rosepaugh, who were the original plaintiffs (and to all their rights the present plaintiff as survivor succeeds), by their own exertions in a freshet had saved the ice in controversy from being lost. By anchoring it to the shore and by labor performed thereon, they were in actual possession when the defendants took and converted it. If, with the consent of Mr. Sheffield, the plaintiffs had taken from the pond a quantity of its water, and being in actual possession, the defendants had deprived them of it, could the plaintiffs have recovered? And when a part of the water has assumed the form of ice, and is thus separable from the rest of the water, and in that form capable of being possessed and held—is in fact thus held and possessed and retained in position for removal—can such possession be taken from them and they be remediless? That which was thus possessed by them and taken from them by others was valuable and can be recovered for, though it still lay in the pond where they had secured it for removal and stacking, though it had not yet been actually removed or stacked. All the possession which could be taken had been taken, and what had been was so marked and visible, and exercised over and towards property capable of actual possession, that in such possession the plaintiffs should be protected.

The conclusion is that the plaintiff is entitled to judgment. The plaintiff's attorney will prepare findings which will be settled on notice.

Matter of Freel

N. Y. COMMON PLEAS.

MATTER OF APPLICATION OF EDWARD FREEL, assignee of
FOLEY & Co.

Attachment — Moneys arising from assigned claims cannot be attached.

Property assigned cannot be reached on attachment based on the charge that the assignment was made to defraud creditors, if the property has changed its form. That is moneys arising from assigned claims cannot be attached, though the claims could have been reached, had the attachment been levied before they were changed into money.

Special Term, January, 1878.

MOTION by assignee of Foley & Co. to compel Mr. David Leventrit, an attorney, to pay over moneys collected by him for said assignee.

M. M. Budlong, for assignee.

David Leventrit, in person.

Peter Cook, for creditor, Hanley.

J. F. DALY, J. — The attachment of Thomas Hanley a creditor of the assignors Foley & Co., which was issued by the marine court on the ground that Foley & Co. had fraudulently disposed of their property, can be levied only upon the property claimed to have been fraudulently assigned and not upon its proceeds (*Lanrence* agt. *Bk. Republic*, 35 *N. Y.*, 320; *Lanning* agt. *Streeter*, 57 *Barb.*, 33; *Campbell* agt.

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Erie R. R. Co., 46 *id.*, 540; *Greenleaf* agt. *Mumford*, 50 *id.*, 543; *McElwain* agt. *Willis*, 9 *Wend.*, 569).

In this case the attachment was levied on two classes of property in the possession of David Leventrit, attorney of the assignee, viz.: Moneys collected from debtors of the assignors, upon claims placed in Mr. Leventrit's hands by the assignee for collection, and, second claims against other debtors of the assignors uncollected.

The proceeds of collected claims are to be regarded in the same light as proceeds of sales of property. Where the claim is uncollected the debt may be levied on under the attachment, but when the debt has been paid before the attachment is issued, nothing remains which is the subject of levy, and the creditors of the assignors can only reach the proceeds by action in equity against the assignee after exhausting their legal remedies.

It follows, therefore, that whatever moneys had been collected by the attorney for the assignee, before the attachment was issued, are not the subject of attachment and must be paid over by Mr. Leventrit to the assignee.

People *ex rel.* Stager agt. Starr.

SUPREME COURT.

THE PEOPLE *ex rel.* ALBERT STAGER agt. CHARLES S. STARR.

Mandamus — the proper remedy to compel a public officer to perform a duty enjoined by law upon him

A writ of *mandamus* will be refused, when there is an adequate remedy at law. But when a duty is plainly and flatly enjoined by law upon a public officer, he may be compelled by *mandamus* to do it.

A *mandamus* is the appropriate and proper remedy by a supervisor of a town, to compel the county treasurer to sue the bond of his predecessor, for not paying over school moneys as required by section 11 of chapter 567 of Laws of 1875.

Where the *mandamus* applied for is to compel official action, if the statute requires such action, the relief must be granted.

Ulster Special Term, July, 1878.

MOTION for a peremptory *mandamus* to compel the county treasurer of Sullivan county to sue the official bond of James R. Knight, former supervisor of the town of Lumberland, in said county, for not paying over school moneys to his successor, the relator.

Mr. Stewart and *Mr. Linson*, for motion.

Mr. T. F. Bush, opposed.

WESTBROOK, J. — The facts upon which this motion depend, are all conceded. James R. Knight has refused, on demand by his successor in the office of supervisor of the town of Lumberland, Sullivan county, who is Albert Stager, the relator, to pay over. \$815.22, conceded to be in his hands.

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Stager was elected supervisor in March, 1878, and has duly qualified. Knight was elected to the same office in March, 1877. The money not paid over is the amount of a special tax levied upon the town, by a vote at the town meeting, in March, 1877.

Chapter 555, of the Laws of 1864, is entitled "An act to revise and consolidate the general acts relating to public instruction." Title 3 of said act is entitled "Of the state, *and other school moneys*, their apportionment and distribution, and herein, of trusts and gifts for the benefit of common schools." The thirty-first section of said title 3, requires the supervisor of every town to give a bond for the faithful disbursement of the school moneys which shall come into his hands, which section is amended by section 11 of chapter 567 of Laws of 1875, entitled, "An act to amend chapter 555, of the Laws of 1864, entitled, 'An act to revise and consolidate the general acts relating to public instruction,'" so as to read as follows: "Immediately on receiving the commissioner's certificate of apportionment, the county treasurer shall require of each supervisor, and each supervisor shall give to the treasurer, in behalf of the town, his bond, with two or more sufficient sureties, approved by the treasurer, in the penalty of at least double the amount of the school moneys set apart or apportioned to the town, and of any such moneys unaccounted for by his predecessor, conditioned for the faithful disbursement, safe keeping and accounting for such moneys, *and of all other school moneys that may come into his hands from any source.* If the condition shall be broken, *the county treasurer shall sue the bond in his own name in behalf of the town,* and the money recovered shall be paid over to the successor of the supervisor in default, such successor having first given security as aforesaid."

Knight gave a bond under this statute, and so has the relator Stager. The county treasurer has refused upon request to bring a suit upon the Knight bond, and this motion is by the present supervisor, Stager, to compel him to do so.

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In addition to the bond, which Knight gave under the act, entitled "An act to revise and consolidate the general acts relating to public instruction," as amended by chapter 567 of the Laws of 1875, he also gave two others. One in the penalty of \$1,000 dollars, payable to the town clerk or to his successor in office, conditioned that he "shall faithfully discharge his duties as such supervisor, and shall well and truly keep, pay over and account for all moneys belonging to his town, and coming into his hands as such supervisor, without fraud or delay." The other is in the penalty of \$4,500, and payable to the town clerk or to his successor in office, and conditioned, that the said James R. Knight "shall faithfully discharge his duties as such supervisor, and shall well and truly keep and pay over, and account for all moneys belonging to his town, and coming into his hands as such supervisor, without fraud or delay."

The county treasurer objects to the granting of the writ of *mandamus*, because, he says, there is an adequate remedy at law to obtain the money by suit upon the two bonds, to which reference has just been made. The general principle undoubtedly is, that the writ of *mandamus* will be refused when there is an adequate remedy at law, but as the relief sought in this proceeding, is to compel a suit at law by the county treasurer upon an official bond of a supervisor of a town, given specially and only to protect the school moneys which might come into his hands by virtue of his office, it is not seen what other remedy the law gives to compel him to do his duty. When a duty is plainly and flatly enjoined by law upon a public officer, he may be compelled by *mandamus* to do it (*People ex rel. The N. Y. & H. R. R. Co. agt. Havemeyer*, 47 *How.*, 494). It is no answer to the application to say, "it is true the law requires me to do what the *mandamus* asked for will compel, but the party who asks me to do my duty can get the moneys which he wishes me to sue for, by a suit to be brought by the town clerk upon another bond given by the same party." If the present supervisor of Lumberland should

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adopt the suggestion of the county treasurer, and require the town clerk to sue, and he should refuse, then the town clerk to an application for a *mandamus* to compel him to bring suit, might say, the supervisor has a remedy at law by having a suit brought on the bond given to the county treasurer. Manifestly, this argument will not answer the application, and the objection is a perversion of a sound principle. The *mandamus* applied for is to compel official action, and if the statute requires such action the relief must be granted.

A reference to the statutes under which the bond is given, which the supervisor requires the treasurer to sue makes this application very clear. The title of the act under which such bond is given, "An act to revise and consolidate the general acts relating to public instruction," and the title of the title which requires it: "Of the state, *and other school moneys*, their apportionment and distribution, and herein of trusts and gifts for the benefit of common schools," the amendment of that act as recently as 1875, by chapter 567 thereof, and the special provision by section 11 of the amendatory statute in regard to the bond, clearly and distinctly show, that whatever other statutes may exist in regard to bonds of supervisors, that one requiring a bond thereunder, and making it obligatory upon the county treasurer to prosecute it, when broken, is now fully in force. This mandatory statute must be obeyed. It is not in any way repealed, modified or changed, and the bond covers any and "all" school moneys which the supervisor obtains.

It is very doubtful if the other bonds are applicable. The one is said to have been given under chapter 78 of Laws of 1866, which requires it to be made in accordance "with the requirements of chapter 179 of the Laws of 1856." The act of 1856 requires a bond to the county treasurer (*sec. 20 of act of 1856*) and this one was given to the town clerk. It is, therefore, probably bad. Chapter 534 of the Laws 1866 as amended by chapter 721 of the Laws of 1868, probably refer to the

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general bond of the supervisor, and not to that specially and specifically to be given for the school moneys.

Without, however, discussing any further, or deciding what can be recovered upon the two bonds given to the town clerk, and to remedies upon which, the county treasurer seeks to confine the present supervisor of Lumberland, it is enough to say, that the bond which such treasurer holds very clearly covers the money in the hands of the late supervisor and not paid over, and that the law requires him to sue it, and he must. It is no defense for him to tell us that perhaps a remedy to obtain the moneys can be had upon another bond. The law marks out his duty, it is plain and clear, and we cannot misunderstand its provisions.

The application for the peremptory writ of *mandamus* is granted.

John Hancock Mutual Life Insurance Co. agt. Nichols.

SUPREME COURT.

THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY agt.
WILLIAM B. NICHOLS and GEORGIANA NICHOLS, his wife,
JOSEPH O. HEGEMAN and JARED G. BALDWIN.

Usury — Life insurance company loaning money on real estate and making an insurance upon the life of the borrower.

It is not *usury* for an insurance company making a loan upon real estate, at the same time to make an insurance upon the life of the borrower or those of his friends.

It seems that this is so, although the taking of the policies was used as an inducement for making the loan, provided the policies were actually issued and the premium charged was the usual and fair premium.

Kings Special Term, February, 1878.

THE actions are brought for the purpose of foreclosing ten mortgages on ten adjoining houses and lots, situated in the city of Brooklyn, executed by the defendant Nichols and wife to the plaintiff, on the 29th day of September, 1874, each for the sum of \$8,000, payable five years after date, with interest, semi-annually, at the rate of seven per cent per annum.

The defense interposed by the defendant William B. Nichols (the other defendants not having answered and being in default) is *usury*. The answer alleges, in substance, that out of the loan of \$80,000 on the ten houses and lots above referred to, Nichols received the sum of \$77,000 only, and that the plaintiff retained and reserved to itself the balance, to wit: The sum of \$1,500, and in addition thereto \$950 for the expenses of searching the title to the premises, and the sum of \$550 for commissions for making said loans.

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The facts are as follows : I. The plaintiff is a life insurance corporation, created and organized in 1862, under the laws of the state of Massachusetts. It has its principal place of business in the city of Boston.

II. In the early part of September, 1874, application was made to the plaintiff by the defendant William B. Nichols, for a loan. Such application was in writing on one of the company's usual printed blanks, and was signed by the defendant personally; and the written portions thereof were likewise in his handwriting. Such application is as follows :

“APPLICATION FOR A LOAN OR MORTGAGE.

“OFFICE OF THE JOHN HANCOCK
 “MUTUAL LIFE INSURANCE Co.,
 “BOSTON, MASS. } .

“The subscriber proposes to the John Hancock Mutual Life Insurance Company *ten loans* of \$8,000 *each* for *five* years, interest payable semi-annually at *seven* per cent per annum, upon the real estate described below :

Situation. — *Southerly side of Fulton Street, 320 $\frac{1}{2}$ feet east of Classon avenue.*

Land. — Measuring 220 *ft.* on the street; extending back 117 feet, containing square feet, of which a diagram is annexed.

Value. — Valued at \$ per square foot. Aggregate value, \$80,000.

Buildings. — Materials, *brown-stone and brick.*

Size. — On *Fulton Street.* *Each* 22 feet, extending back 50 feet, of *three stories and basement.*

Value. — Valued at \$12,000.

Estate. — Assessed value, \$. Cost, \$.

Occupation. — Occupied by ,
 for .

Rent. — Rented for \$ per annum.

Note — Note to be signed by , and to be dated.

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Insurance. — To be insured in such insurance company, and in such amount as this company shall approve. *Now insured in the Continental Fire Ins. Co.*

Title. — The title to be examined, and the papers to be prepared by the solicitor of the company, at the expense of the applicant.

Remarks. —

Boston, 18 .

(Sd.) *William B. Nichols, applicant.*"

(The words printed in italics, and the figures are, in the original, in the handwriting of said Nichols.)

Such application was forwarded by mail through Mr. Gale, the district agent, in New York, of the plaintiff, to Boston, and there received by Mr. Bacon, the treasurer of the company. The application was answered by letter as follows:

"BOSTON, September 7th, 1874.

"WM. T. GALE, Esq., New York city:

"Dear Sir. — Mr. Bacon directs me to say, that we will loan \$8,000 on each one of the ten stores in Brooklyn, and pay \$50,000 as soon as the title is examined and papers signed — the title to be examined by Mr. B. W. Griswold, of the firm of Blatchford, Seward, Griswold & Da Costa, of 29 Nassau st., N. Y.; \$30,000 in U. S. bonds to be deposited with the company as security that the buildings will be completed free from lien, and the balance of loan, \$30,000, to be paid on completion.

"Truly yours,

"GEO. B. AGER,

"*Secretary.*"

Mr. Gale replied to this letter on September 9th, 1874, as follows:

"NEW YORK, Sept. 9th, 1874.

"EBEN BACON, Esq., Treas.

"Dear sir:

"I have seen Mr. W. B. Nichols, the applicant for the loan,

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and he says he accepts your terms, only that he wants all the money (\$80,000) now, to be paid as soon as the title is examined and papers signed. He deposits with the Co., Gov't. bonds to the value of \$30,000 as security that the buildings will be completed free from lien. His broker told me he only wanted \$30,000 now, but it seems he was wrong — for Mr. Nichols says, 'why should I deposit \$30,000 Gov't. bonds unless I get the whole of the money?' and says you would have ample security for the whole — and the buildings will be finished about Nov. 1st.

"I have told him I will give him your answer by Saturday next, at the latest.

"Yours truly,
"(Sd.) WM. T. GALE,
"Dist. Agt."

To such letter Mr. Bacon responded as follows :

"BOSTON, 10th Sept., 1873.

"WM. T. GALE, Esq.

"Dear Sir :

"Yours of the ninth is received this A. M.

"I will be ready to pay the \$80,000 upon completion of the examination of the title. If not already done, Mr. Nichols should give the deed of the property to Mr. Griswold and let him commence upon it at once. The conditions are as follows : \$8,000 ea. on 10 stores, 5 years, @ 7 per cent. per annum, payable semi-annually, \$30,000 U. S. Bonds to be placed in our hands as security that the building will be shortly completed free from lien.

"We generally date the loan from the date of application. If objection is made to this, can't you arrange it in some way ? Date it, if you can, September first ; if not, as soon after that as you can.

"We will pay the money at once upon hearing from Mr. Griswold that the papers are in order.

"Resp'ty,
"EBEN BACON, *Treas.*"

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Such, then, was the contract between the parties. No question arises about the \$30,000 United States bonds mentioned in the last letter, because, on the completion of the buildings, they were duly returned to Mr. Nichols.

III. The plaintiff forwarded to Mr. Griswold, its solicitor in New York, the sum of \$80,000; and on the execution of the bonds and mortgages, Mr. Griswold paid to the defendant W. B. Nichols, including \$200 paid for premium on fire insurance, the sum of..... \$77,000
 Retained for his services and disbursements in
 searching the title..... 950
 And, by direction of Nichols, paid to Charles Whitlock, his (Nichols') broker the remainder 2,050
 Total..... \$80,000

For this last mentioned sum of \$2,050, Mr. Griswold drew, as requested by Whitlock, the broker, two checks, both to his order, one for \$1,521.17, and the other for \$528.83, and handed them to Whitlock.

It is true that Nichols tried to deny that he directed Mr. Griswold to pay the remainder to Whitlock; but the preponderance of evidence, and the fact that the checks would not have been so drawn without Nichols' instruction, irrespective of the contemporaneous memoranda made by Mr. Griswold in his check-book, is the other way. Mr. Griswold's testimony on this subject is further supported by the fact that, as he testified, Whitlock told him that he was employed by Nichols to *secure this loan*; that *in case he succeeded* in procuring the loan of \$80,000 on these ten houses—\$8,000 on each—he *was to receive \$3,000 from Nichols, out of which he was to pay all the expenses of the loan*, title examination and every thing. Mr. Griswold is further corroborated by Mr. Harper, who testifies, in substance, that *Whitlock told him the same thing*, and substantially by Whitlock also. Nichols himself, on being recalled, testified, in answer to a

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question propounded by his own counsel, as follows: "As Mr. Griswold was taking his check-book out to write the check, he says, 'I am to retain \$3,000, am I not?' 'Yes, Mr. Griswold, *you are.*'" Or, as Whitlock testified: "Q. Why did Mr. Griswold give you the check for the balance, if Mr. Nichols wasn't there?" "A. Because Mr. Nichols told him that. He says, 'am I to reserve \$3,000 of this?' 'Yes, sir.'" "Q. Is that all that was said?" "A. I don't know that that was all, but *he gave him to understand that three thousand was to be reserved out of the \$80,000. That was to go toward paying the expenses; I don't know that he knew, or that Mr. Griswold knew all about it.*"

IV. Whitlock was employed by Nichols, as a broker, to effect the loan. He was neither directly or indirectly connected with, or employed by, the plaintiff. W. T. Gale was district agent of the plaintiff in the city of New York. His functions were limited "to procure life insurance, attend to the collection of premiums on policies as they became due, and remit to the company." Besides, his whole conduct and the correspondence clearly show that with the making of loans he had no concern. His compensation depended to a great extent on the life insurance he obtained, as he received a commission thereon, the company guaranteeing, however, that his income should not be less than \$2,000 during the six months he was in their employment.

V. The plaintiff issued and delivered to Whitlock, policies of insurance on his own, his son's and some friends' lives, amounting to \$37,000. The annual premium thereon amounted to \$1,521.17, which Whitlock paid by handing to Gale, as agent for the company, one of the two checks which he had received from Mr. Griswold, as above narrated, first indorsing the same. Whether this check was handed to Gale by Whitlock in Mr. Griswold's office, or at his own office, is utterly immaterial, for Whitlock testified, as above alluded to, that he did not tell Mr. Griswold any thing about life insurance, *and that he, Griswold, knew nothing about it.* It is more

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than likely, however, such being the remembrance of both Mr. Griswold and Gale, that the check was given to Gale in his office. It is true that Whitlock testified to the contrary, in fact, that he never received such check, never had it in his hand, did not know what name was to it. When the check, on being produced, appeared to be to his order, and bearing his indorsement, he had to admit that all his testimony given on that subject, *which he was as positive was as true as any other thing he had testified to*, was incorrect. The probabilities are that all the remainder of his testimony is equally incorrect.

VI. The rates of premium charged were the *usual, regular rates* of the company, and Gale declined to take less premium for the policies. At the expiration of the first year, Whitlock claimed that he was entitled to "paid-up policies." The president demurred thereto; but it resulted in Whitlock receiving "paid-up policies" for a majority of the policies, making three paid-up policies, one for \$500, and two for \$250 each, total \$1,000, *which he now owns*; and the other policies, under the Massachusetts law, lapsing after *two* years from their date of issue, *though only one year's* premium had been paid. The plaintiff actually lost money by the issuance of the policies. Harper also gives the true report of the conversation that occurred between Mr. Thornton and Whitlock, a year after the issuing of the policies, when Whitlock demanded "paid-up policies." He contradicts Whitlock, and says what Mr. Thornton remarked was (as would be very natural to remark), that had the company known that these policies would suffer to be lapsed, or "paid-up policies" demanded after the first year, they would *not have issued the policies* of insurance, because a direct loss thereby resulted to the company. Mr. Harper distinctly says that *nothing* was said *about a mortgage*.

VII. It is claimed by the defendant that the procuring of these policies was exacted as a condition precedent to the loan being made. He and Whitlock testified in substance that

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Gale, the district agent, told them that the application for the loan was refused, and suggested that he thought he could arrange it if they would take out policies, the premium of which would amount to about \$1,500; that he was told to make such offer; and that subsequently they were informed that the company had accepted the offer; that Nichols, while acceding to the proposition, said to Gale, in Whitlock's presence, that the manner of issuing the policies he left entirely to Whitlock, and that he (Whitlock) could fix that up to suit himself. The story, as told by these two men, is contradicted by Gale, who states, in substance, that Whitlock was the person who first proposed the life insurance; that it is possible the company may have, at first, declined the loan, as to which he "does not remember," *but it had nothing to do with life insurance*; that the agreement concerning life insurance was one made between Whitlock and himself, *and had nothing to do with the company's making the loan*; for the making of the loan was not within his province, but only the obtaining of insurance on the premiums for which he earned a commission. The check of \$1,521.17, which Whitlock indorsed and gave to Gale, was by him deposited in his bank account, as receipts for premiums, and it was by him credited in his general account with the company for and as such premiums.

If the defendant's story and theory be adopted, it is, of course, utterly immaterial with what specific check or money these premiums were paid, so long as such specific check or money did not, in law, belong to the defendant Nichols.

VIII. The defendant Nichols paid his interest for two years after the delivery of the bond and mortgage, to wit, up to the 29th day of September, 1876. Thereafter he ceased to pay the interest, and did not attempt to avail himself of the pretended defense of usury until foreclosure suits were instituted.

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IX. The cause was tried on the 28th of December, 1877. On that day there was due, on each mortgage, the following sum :

Principal	\$8,000 00
Interest from September 29th, 1876, to date of trial	697 82
Premium of insurance paid since the filing of the complaint	12 00
Total	<u>\$8,709 82</u>

To which is to be added the sum of one dollar and fifty-three cents for interest for each day from the time of the trial until the decision.

Charles M. Da Costa and *C. A. Seward*, for plaintiffs.

I. The contract between the parties is found in the written application, prepared and signed by the defendant Nichols himself, and in the letters of the plaintiff's officers to Gale, their district agent in New York. No mention is anywhere therein made of life insurance. Being the written, expression of the parties at the time, it ought to prevail, on well-settled rules, over loose and contradictory oral statements by interested parties, especially when such loose and contradictory oral statements are invoked in favor of an unconscionable defense, interposed for the purpose of defrauding the plaintiff of the sum of \$80,000. If, as it is confidently claimed, the preponderance of testimony shows that Nichols agreed to pay to Whitlock, his broker, the sum of \$3,000 for procuring the loan, provided the broker would pay all the expenses out of such \$3,000, then it is utterly immaterial to consider whether or not the plaintiff made it as a condition of the loan that Whitlock, the broker, should furnish them with life insurance, the premium of which would amount to about \$1,500. It would be very difficult to cite any principle or any authority which made a contract

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between A and B usurious, because A and C entered into an independent and mutually beneficial contract founded upon a valuable consideration. Any agreement between Nichols and Whitlock, his broker, by which the broker was to receive any amount of money for his services, does not render the contract between the plaintiff and Nichols usurious. Since *Condit agt. Baldwin* (21 N. Y., 219) the question is no longer open to debate (*See Estevez agt. Purdy*, 66 N. Y., 448, where *Condit agt. Baldwin* and subsequent authorities are cited; and also *Guardian M. L. Ins. Co. agt. Kasaro*, 66 N. Y., 544).

Whitlock had certainly a right to insure in the plaintiff's company his own, his son's, and his friends' lives, receive the policies therefor, and pay the usual fair premium thereon. Such insurances were valid contracts between Whitlock and the company. He has held the company to them, and has had, and yet has, the benefit of them.

II. It has already been suggested that the only contract between the parties is the one evidenced by the written application and letters. If it be said that, from the parol evidence of Whitlock and Nichols on one side, and that of Gale on the other, the terms of the contract are to be gathered, yet, even then, as the defendant has the burden of proof, he has failed to establish the fact (as above more particularly referred to) that the application for the life insurance policies was made a condition by the plaintiff for making the loan.

It is plain to see that the head officials in Boston, who alone determined on the acceptance of the loan, knew nothing of any matter connected with the life insurance. The interest to effect that was specially with Gale, the district agent, who the more the premiums he got, the larger were his receipts from commissions thereon. Gale had, however, nothing to do with the effecting of the loan, save to carry out the instructions of his principals in Boston. There clearly was no intent on the part of the plaintiff to violate the usury laws, for their contract provided but for seven per cent, and such con-

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tract, as accepted in writing, did not make the obtaining or non-obtaining of any life insurance policy a condition. It is equally clear that the company never gave and never intended to give Gale any authority to violate the usury laws.

Usury consists in taking more than seven per cent on a loan of money, in pursuance of a corrupt and unlawful agreement to that effect, made at the time by the parties to such loan. Without such corrupt and unlawful agreement there is no usury. The loose statements of what Gale said about the company being able to get eight per cent in Boston, as testified to by Whitlock, is contradicted by Gale. But even if true, the declarations of an agent with reference to a loan — when such agent had nothing to do with the making of loans, when his only functions were to obtain life insurance, collect the premiums and remit the same — would, under no rule of law, be binding on, or evidence against, his principal.

III. But assuming, for the sake of argument, and for that only, that application for life insurance policies, on which premiums to the amount of about \$1,500 should be paid, was a condition precedent, or an inducement for making the loan, yet that would not sustain a defense of usury, provided, as appears in this case, the policies were actually issued and the premium charged was the usual and fair premium.

(a.) The statute against usury does not forbid the entering into of independent collateral contracts between parties, contemporaneously with or as a condition of the loan of money, provided such contemporaneous contracts be *bona fide*, and not fictitious, and thus a mere shift or device to evade the statute (*Utica Ins. Co. agt. Cadwell*, 3 *Wend.*, 296; *New York Fire Ins. Co. agt. Donaldson*, 3 *Edw. Ch.*, 199; *Brooklyn Bank agt. Warring*, 2 *Sand. Ch.*, 1; *Dondall agt. Lenox*, 3 *Edw. Ch.*, 267-275; *Bullock agt. Boyd*, *Hoffman's Ch.*, 294-299; *Fellows agt. American Life Ins. and T. R. R. Co.*, 1 *Sandf. Ch.*, 203; *Thomas agt. Murray*, 32 *N. Y.*, 605-612; *Beals agt. Benjamin*, 33 *id.*, 61; *Thurston agt. Cornell*, 38 *id.*, 281; *Valentine agt. Conner*, 40 *id.*, 248;

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Swydam agt. *Westfall*, 4 *Hill*, 211; *Seymour* agt. *Marvin*, 11 *Barb.*, 80; *Cock* agt. *Flack*, 93 *W. S.*, 344).

(b.) But, while without authority in this state, the reports of England and New Jersey furnish direct precedents against the contention of the defendant.

In *Washington Life Ins. Co. agt. Paterson S. M. Co.* (10 *E. C. Green*, 160 [*N. J. Eq.*]) the facts were almost identical with those claimed by the defendant in this case. It was held that the requirement by the lender, a life insurance company, that the *borrower* should take out a policy of insurance as a condition of making the loan, was not, of itself, evidence of a usurious agreement (*See, also, Downes* agt. *Green*, 12 *Mees. & W.*, 481).

Similar doctrine, too, has been held in the case of annuities.

Thus a provision for insurance of the grantor's life does not make the grant of an annuity impeachable for usury (*Byrne* agt. *Kinnefeck*, 1 *Hogan*, 184; *French* agt. *Morgan, Batty*, 254; *Strong* agt. *Ormsby*, 2 *Hogan*, 59).

And in *Manly* agt. *Hawkins* (1 *Drury & Walsh*, 363) it was held that the circumstances of the repayment of the purchase-money being secured by an insurance on the life of the grantor, and the grantor having covenanted to pay the premiums did not bring the case within the statute of usury.

IV. Usury must be strictly proven as alleged, and any variance is fatal. Such has been the unbroken rule, both at law and in equity, from *Smith* agt. *Bush* (8 *Johns.*, 84), to *Wheaton* agt. *Voorhis* (53 *How. Pr. R.*, 319 and cases there cited; *see, also, Vroom* agt. *Ditmas*, 4 *Paige*, 526; *New Orleans G. L. & B. Co.* agt. *Dudley*, 8 *Paige*, 457, 458).

Morris & Pearsall, for defendants.

GILBERT, J. — I think the plaintiff is not bound by the conversation between Gale and Nichols and Whitlock. Nor can I give full credence to the version of that conversation,

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which was given by the latter. Assuming, however, that the evidence is sufficient to warrant the inference that the plaintiff refused to make the loan unless the defendant effected the insurance put in evidence by him, I think the transaction was not usurious for two reasons. (1.) The plaintiff gave *quid pro quo* for the premiums received. (2.) Whether the insurances would enable it to acquire the legal interest on the sum loaned, depended upon the contingency of the assured living for a period long enough to produce that result. It is not unlawful for a lender to refuse to lend to persons who are not his customers. The business of the plaintiff is to make insurances upon lives. It must invest its surplus funds. To confine its loans to its own patrons, is no more than the insisting upon fair reciprocity. There may be cases where the issuing of policies of life insurance is resorted to as a mere shift or device to cover up the real transaction which is an usurious one; but that is not the case here.

I think, therefore, that, upon principle as well as upon authority, the plaintiff is entitled to the usual judgment with costs (*Washington Company* agt. *Paterson Company*, 10 *E. C. Green*, 160; *Down* agt. *Greene*, 12 *M. & W.*, 481; *Manly* agt. *Hawkins*, 1 *D. & Walsh*, 363.)

Montague agt. Worstell.

N. Y. MARINE COURT.

WILLIAM L. MONTAGUE agt. JOHN P. WORSTELL.

Examination of parties—perpetuation of testimony.

There is no way under the Code of Civil Procedure, or in the law of this state, *now* to perpetuate the testimony of a party defendant at *his own instance*.

Under the Code of Civil Procedure any person can be examined conditionally before trial at the instance of either party to a suit. But a *party to an action* cannot be thus examined, excepting at the instance of the *adverse party*.

Special Term, May, 1878.

THE defendant being mortally ill and the action being at issue, motion was made to perpetuate the testimony of the defendant.

F. F. Marbury, Jr., for plaintiff.

M. M. Budlong, for defendant.

MCADAM, J. — The materiality of the evidence is shown, and all of the statutory requirements have been complied with (3 R. S. [6th ed.], p. 652), and I would willingly make the order were it not for the fact that the statutory provision in question has been expressly repealed by the act of 1877 (*chap. 417, sec. 3*), and the case is not embraced in any provision of the new Code of Civil Procedure (*sec. 872, subd. 5*) because the person to be examined is a party to the action.

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The application will therefore be denied with costs. Under the new Code any person can be examined conditionally before trial at the instance of either party to a suit. A party to an action cannot, however, be thus examined, excepting at the instance of the adverse party. So that, in case there is danger of a party dying before trial, there is no means of perpetuating his testimony, no matter how important such testimony may be.

Vandermark agt. Vandermark.

SUPREME COURT.

ALBERT S. VANDERMARK, administrator, &c., of ABRAHAM
VANDERMARK, agt. GEORGE W. VANDERMARK.

Gift mortis causa—upon what facts sustained.

The deceased, during his lifetime, had made a deposit in the Ulster County Savings Institution to the credit and in the name of the defendant, his son. He had been accustomed, whilst living, to stop with one G. C. V. When the deceased was about seventy-three years of age, and about two weeks before his death, he was leaving the house of said G. C., and complained of his health and said he should not live long. He further said, leaving with George C. the box which contained the bank-book, "that he intended that for the defendant and that G. C. must let no other person have it, except there was five dollars for S." In about two weeks from this time the deceased died. He said to another witness "he had money in the bank for his son George; the reason why he had done this was, he had given a farm to M. and he did not like him. He had done for the rest, and never done any thing for George." The key to the trunk which contained the bank-book, was found in the pocket-book of the deceased after death.

Held, that this was a valid gift *mortis causa* and must be upheld.

ACTION tried at Ulster circuit in January, 1878, without a jury.

Van Etten & Clearwater, for plaintiff.

F. L. Westbrook and *Mr. Vanderlyn* for defendant.

WESTBROOK, J.—The suit is brought to recover moneys drawn from the Ulster County Savings institution by the defendant, after the death of Abraham S. Vandemark. The defendant claims them by gift from the intestate.

Abraham, during his lifetime, had made a deposit in the

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Ulster County Savings Institution, to the credit and in the name of the defendant. He had been accustomed, whilst living, to stop with one George C. Vandemark. When the deceased was about seventy-two or seventy-three years of age, and about two weeks before his death, he was leaving the house of said George C., and complained of his health, and said he would not live long. He further said, leaving with George C. the box which contained the bank-book: "That he intended that for the defendant, and that I must let no other person have it, except there was five dollars for Sime." In about two weeks from this time the deceased departed this life. To another witness, he said: "He had money in the bank for his son George. The reason why he did this was, he had given a farm to Morey, and he did not like him. He had done for the rest, and never done any thing for George." The key to the trunk which contained the bank-book was found in the pocket-book of the deceased after death. The question is, upon these facts, can a gift to the defendant be sustained?

In *Grymes agt. Hone* (49 N. Y., 17) the following facts appeared: The deceased made and executed to the donee a written assignment of shares of stock in the Bank of Commerce of New York city. "After this paper had been signed 'he kept it by him for awhile' (how long no where appears) and afterward handed it to his wife to put with the will, and other papers, in a tin box she had. When he gave to his wife the paper so drawn, he said: 'I intend this for Nelly. If I die, don't give this to the executors; it isn't for them, but for Nelly; give it to her, herself.' She asked, 'Why not give it to her now?' 'Well,' he said, 'better keep it for the present; I don't know how much longer I may last, or what may happen, or whether we may need it.' * * * It was admitted that, at the time of executing said instrument, the donor was in failing health, and so continued until his death, January 23, 1868." The court held this a valid gift *mortis causa*.

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The case cited is no stronger than the one before us. The deposit of the money in the bank to the credit of the donee was, certainly, as strong evidence of the intent to make the gift as the drawing of the assignment in the other. Perhaps stronger, for it probably put it out of, and beyond the control of the donor. It is true that, by the usage of the bank, the book, which the old gentleman retained, might have drawn the money. If the bank, however, had seen fit to retain the money for the donee, would it not have been justified in so doing? Or, if the donee had gone to the bank and claimed it, would the bank have been justifiable in paying it elsewhere? I would be inclined to answer both the questions in favor of the donee (*Millsbaugh agt. Putnam*, 16 *Abbott*, 380; *Van Deusen agt. Rowley*, 8 *N. Y.*, 358), but that is unnecessary to dispose of the case. Certainly, the deposit to the credit of the donee was evidence, as the undelivered assignment in the other case was of the intent formed to make a gift at some time. Coupled, too, with the declarations that the deposit had been made for the benefit of the defendant, and that the other children had been provided for, and this was intended for George, the actual deposit becomes controlling to show that it was made in view of death. The bank-book was kept by the deceased "for awhile," as the assignment was in the other, and then, two weeks before death, with the apprehension thereof, and the pains indicating its approach upon him, he leaves the box or trunk containing the book with a friend, with an express and clear injunction to give it to the defendant, and to no one else, in case of death; that he intended it for him, and him alone. It is true he retained the key of the box, as the donor in the other retained partial control by a delivery to his wife, accompanied by a declaration that he might recall the gift if his needs so required, because he may have thought, as the donor in the other case did, that it was "better to keep it for the present," because he did not know "how much longer" he might "last, or what may happen, or whether" he might

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"not need it;" but he did leave the box itself, which contained the book, with positive directions to deliver to defendant in case of death. The delivery could be made, and the possession of the book obtained without the key; that was not necessary to enable the party who was interested in the bequest from fully executing it (*Penfield agt. Thayer*, 2 *E. D. Smith*, 305).

The case of *Sessions agt. Moseley* (4 *Cushing*, 87) is also in point. Without, however, going over that case, but simply referring to it, it is clear, from the deposit made, as the declarations of deceased show, with intent to give the money to George in case of death, and the leaving the box with a friend, to be delivered when such death was expected, that there was a valid gift to the defendant, which must be upheld.

Roby *et al.* agt. Hallock.

SUPREME COURT.

SIDNEY B. ROBY *et. al.* agt. EMMA F. HALLOCK, impleaded, &c.

Answer — when not to be stricken out as sham, false and untrue.

Where the complaint was upon a promissory note, and alleged that it was "duly indorsed to the plaintiffs before maturity, for value," and the answer was a denial of any knowledge or information sufficient to form a belief whether the note stated in the complaint was ever transferred or indorsed to plaintiffs, as alleged in said complaint, or otherwise; on motion to strike out answer as sham, false and untrue:

Held, that, the issue made was a material one, and could not be stricken out as sham.

An answer to a material fact stated in the complaint, denying sufficient knowledge or information thereof to form a belief, makes a good issue, upon which the plaintiff holds the affirmative, and which it is incumbent upon him to prove.

The court has no power to strike out such an answer.

Monroe Special Term, August, 1878.

MOTION by plaintiffs to strike out answer as sham, false and untrue.

The complaint is upon a promissory note of \$160, alleged to have been made by defendant Hallock, payable to the order of the defendants Meacham and Burr, by which she charged her separate estate and which she delivered to the other defendants, who "duly indorsed the said note in their firm name to the plaintiffs before maturity for value." The answer is a denial of "any knowledge or information sufficient to form a belief whether the note stated in the complaint was ever transferred or indorsed to plaintiffs as alleged in said complaint or otherwise."

Chas. M. Williams (F. M. Botlum, attorney of record), for motion, cited Fleury agt. Roger (9 How. Pr., 215);

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Commonwealth Bank agt. *Pryor* (11 Abb. [N. S.], 227); *The President, &c., of Agawam Bank* agt. *Egerton* (10 Bosw., 669-673); *People* agt. *McCumber* (18 N. Y., 315); *Kay* agt. *Whittaker* (44 *id.*, 566-573); *Corbett* agt. *Eng* (22 How. Pr., 8; S. C., 13 Abb., 67, and 8 How., 9); *The Manufacturers' Bank of Rochester* agt. *Hitchcock* (14 How., 407); *Miller* agt. *Hughes* (13 Abb. Pr., 93 n); *McCarty* agt. *O'Donnell* (7 Robt., 431); *Roome* agt. *Nicholson* (8 Abb. [N. S.], 343); *Hays* agt. *Southgate* (10 Hun, 513).

T. Horr, opposed.

ANGLE, J. — The only question in the case is whether the court has power to strike out the answer, and if it has the power, I am quite satisfied it should be exercised in this case. That the issue made was a material one, was long since settled (*Snyder* agt. *White*, 6 How., Pr., 321; *Leach* agt. *Boynnton*, 3 Abb. Pr., 1; *Sherman* agt. *Bushnell*, 7 How., 171), and it cannot be stricken out as sham (*Thompson* agt. *Erie R. R. Co.*, 45 N. Y., 468).

The plaintiffs' counsel cites and relies much upon *Kay* agt. *Whittaker* (44 N. Y., 566), decided by the commission of appeals, in September, 1871, and after the court of appeals had, in the same year, in the cases of *Wayland* agt. *Tysen* and *Thompson* agt. *Erie Railway Company* (45 N. Y., 281, 468), held the other way.

The case of *Kay* agt. *Whittaker* goes much to sustain the *People* agt. *McCumber* (18 N. Y., 315), which judge GROVER says in *Wayland* agt. *Tysen*, did not involve the point, and that it cannot be regarded as an authority for the construction contended for, and the practice has since conformed to the latter case. *Schutze* agt. *Rodewald* (1 Abb. N. C., 365), *Fellows* agt. *Muller* (38 N. Y. S. C. R., 137), and *Farmers and Mechanics' Bank* agt. *Leland* (50 N. Y., 673), appear to cover this case completely.

The motion must be denied, but as it was sustained by *Kay* agt. *Whittaker*, it is without costs.

Balheimer agt. Reichardt.

SUPREME COURT.

GEORGE L. BALHEIMER agt. GEORGE REICHARDT.

Specific performance of a contract—Broker—Middleman—Fraud or misrepresentation.

In cases of exchange of property, real estate brokers, employed as middlemen to bring purchasers together to enable them to make their own bargains, may charge commissions to both parties. They are not agents to buy or sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller.

One who has been induced, by fraud or misrepresentation, to enter into a contract, may, after the discovery of the alleged fraud and with full knowledge of the facts, affirm the contract and waive the fraud.

Where the fact was established that after defendant had been informed of the alleged misrepresentations, and had refused to carry out the contract, he, nevertheless, applied to, and obtained from plaintiff an extension of the time of performance, on his (defendant's) promise to execute it. This was on the day preceding the day first fixed in contract for the performance, and on that day a paper was executed by both parties, extending the time five days, and agreeing that the contract should be closed on that day:

Held, that this paper should be regarded as a positive affirmation of the contract by the defendant, after he had become possessed of a knowledge of all the facts, which he now claims entitle him to a rescission or cancellation of the contract, and that plaintiff is entitled to a decree for specific performance.

Special Term, January, 1878.

THE above action was brought to specifically enforce a contract for the exchange of real estate, dated May, 1877.

The defense set up, was misrepresentation, made by the defendant's broker (one Roth) as to plaintiff's property; that said broker had accepted a commission from plaintiff for the ser-

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vices he had rendered him (plaintiff). The defendant claimed that this, in fact, constituted bribery on part of plaintiff.

The testimony established the fact that defendant, after he had been informed of the alleged misrepresentations, and had refused to carry out the contract, nevertheless applied to, and obtained from plaintiff an extension of the time of performance, on his (defendant's) promise to execute it. This was on the day preceding the day first fixed in contract for the performance. The other facts appear in the opinion.

E Benneville, for plaintiff.

A. R. Dyett, for defendant.

LAWRENCE J. — On the trial of this case I was strongly of the impression that the defendant after having entered into the contract now sought to be enforced had repented of his bargain, and was casting about for some excuse for refusing to fulfill it.

Having perused the testimony carefully I am strengthened in this impression.

The evidence does not impress me as proving that the defendant was induced to enter into the contract, by any fraudulent representations made either by the plaintiff or by Roth. As to the alleged representations he is contradicted by the plaintiff and by Roth.

He had visited the property in person, before the contract was executed, and had made quite a minute examination of it.

And although Roth was present at the time the contract was executed, the parties appear to have taken the negotiations into their own hands, and to have agreed, after considerable discussion, as to the terms upon which the property should be exchanged.

Unless, therefore, there is some controlling rule of law which stands in the way of the enforcement of this contract, I think that the plaintiff is entitled to relief.

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It is said that Roth was the agent of the defendant, for the purpose of effecting a sale of the defendant's property, and that his receipt of a commission from the plaintiff was a bribe which renders void the contract.

It is not proposed to deny the principle so well established, by the cases cited by the learned counsel for the defendant, that a party cannot be the agent, of both the principals to a contract, without their knowledge and assent.

This is in consonance with reason, morals and equity. It can, however, be maintained in this case with much force, that this transaction was virtually an exchange and not a sale of property, and that, therefore, Roth was to be considered simply as a middleman, to bring the parties together to enable them to make their own bargain. It is held, in such cases, that the middleman is not an agent to buy or sell within the rule adverted to (*Siegel agt. Gould, 7 Lansing, 177 and authorities cited.*)

But I do not think that it is necessary to rest this case solely upon the ground just stated. There is another principle which the plaintiff is entitled to invoke in his favor, *i. e.*, that one who has been induced by fraud or misrepresentation to enter into a contract, may, after the discovery of the alleged fraud and with full knowledge of the facts, affirm the contract and waive the fraud (*Bronson agt. Crocker, 8 N. Y., 182; Adams agt. Sage, 28 id., 109*).

On the evidence, as I have already stated, I do not think that the defendant has succeeded in making out that he was the victim of fraud or misrepresentation, but conceding that he was, I am of the opinion that the evidence establishes most clearly that both the defendant and his attorney, Mr. Meyer, knew all the facts of the case on the 31st day of May, 1877, and prior to that date, including the fact that Roth had received a commission from the plaintiffs.

Yet, on that day, they notified the plaintiff and his attorney that they were prepared to carry out the original agreement if an extension of five days was granted to them for that

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purpose. It will be remembered that on that day the time for performing the contract had not expired, the first of June being the day specified in the contract for the delivery of the papers.

This being the fact, and after fruitless efforts had been made to agree upon some changes in the terms of the agreement, the following paper was executed between the plaintiff and the defendant:

"The time of closing of contract of May 5th, 1877, made between George Reichardt and George L. Balheimer, is hereby extended to June 5th, 1877, at 12 M., when the same is to be closed.

(Signed)

"GEORGE REICHARDT.

"GEORGE L. BALHEIMER.

"May 3, 1877.

"In presence of

"E. M. B."

I cannot regard this paper as other than a positive affirmation of the contract by the defendant, after he had become possessed of a knowledge of all the facts which he now claims entitle him to a rescission or cancellation of the contract.

Why then should he not be required to carry out its terms?

With my understanding of the evidence in this case, I reach the conclusion that the plaintiff is entitled to a decree for a specific performance, and it is ordered accordingly.

McCarthy agt. McCarthy.

SUPREME COURT

DAVID K. MCCARTHY agt. REBA W. KIMBALL, otherwise called
REBA W. GILBERT, otherwise called REBA W. MCCARTHY.

Summons — substituted service — Code of Civil Procedure, section 435.

Where a summons was issued in August, 1877, and all the attempts which had been made to serve the same were prior to the 1st of September, 1877, at which time the Code of Civil Procedure took effect:

Held, that a proper case was made out for the order for substituted service, under section 435, on proof that such attempt *had* been made, and that she avoided service, so that personal service could not be made.

The facts necessary to be proven before the order can be granted must exist at the time of the application, as the language plainly imports, and nothing in the words imply, that the avoiding of service must have occurred after a certain date.

The proof required by section 435, on which to found the order for substituted service, need not necessarily be direct and positive, but "*satisfactory proof*." Such proof as satisfies the mind of the judge to whom the application is made, that the state of facts exist which entitles him to make the order.

What is "*satisfactory proof*," fully discussed.

The attempts to serve the summons were all made during August, 1877.

The new Code took effect September 1, 1877. On that day plaintiff's attorney called on defendant's attorney, and at *his* request made a slight change in the summons to conform to the new Code. Defendant objects that *the* summons which was attempted to be served during August was not the identical paper served under the order, and consequently if there was any attempt to evade the service of a process, it was not that one which was served.

Held, that this objection was untenable. The summons was, still even after the change, the old summons amended; and even if it had not been, that fact would have made no difference. The loss of the identical paper which was attempted to be served would not render nugatory these attempts at service. Upon the establishment of the effort to avoid the service the right to the order depends, and not upon the identity

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of the papers, so long as either, if served, would commence the same and not a different action.

Special Term, 1878.

MOTION to set aside an order for substituted service of a summons.

A. C. Davis, for the motion.

Hiscock, Gifford & Doheney, opposed.

WESTBROOK, J. — On the 4th day of September, 1877, on what was deemed "satisfactory proof" as required by section 435 of the Code, an order was made by me for substituted service of the summons in the above entitled action on the defendant therein.

A previous motion to me by defendant to vacate such order was denied upon the ground, that as the order for substituted service grants "a provisional remedy," section 772 provided it could only be vacated by motion to the court (*See 54 How., 97*). An appeal was taken from the order refusing to vacate the order of substituted service to the general term of this court, which has decided that the judge, who made the original order for substituted service has power to set aside the same (*see 13 Hun, 579*), and the motion for that object is now renewed before me upon the same papers upon which it was first heard and refused. An examination of the matter upon the merits now becomes necessary.

By section 435 an order for substituted service of a summons "upon a defendant residing within this state may be made by the court or a judge thereof, or the county judge of the county where the action is triable, upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where the defendant resides, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his

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sojourn cannot be ascertained, or, if he is within the state, that he avoids service, so that personal service cannot be made."

The order for substituted service was founded upon the affidavit of Charles H. Hallock, a party accustomed to serve legal papers, verified September 4, 1877, and establishing the following facts: First. That Hallock, on the evening of August 23, 1877, went to the dwelling of defendant's father, Albert Gilbert, at No. 77 West Twelfth street in New York city, with whom she resided, and inquired of the servant, who answered the door call, for the defendant. The servant gave the information that the defendant was in, and asked the deponent his business. The reply was "that he had a paper for her, said defendant, which deponent was instructed to deliver to said defendant personally." The servant went up stairs, and soon returned with Mr. and Mrs. Gilbert, the father and mother of the defendant. The interview which then took place, is thus detailed in the affidavit: "Deponent then asked to see Mrs. McCarthy, as he, deponent, had a paper for her, which he was directed to deliver to her personally. The said Gilbert then said he was the father of defendant, and that she could not be seen, and that all communications or papers must go through him. The said Gilbert then asked deponent if he was from Syracuse, and deponent told him he was not. He then asked deponent if he was acquainted with Mr. McCarthy, the plaintiff herein, and deponent told him he was not, and thereupon deponent left said house." Second. That Hallock went to the house again on the 25th August, 1877, and inquired for the defendant. He was told she was in, and the servant showed him into the sitting room, and the mother, from up stairs, asked what he wanted. The answer was, "he wanted to see the defendant, and that he had a paper for her." The mother replied, "that defendant was sick, and could not be seen." Hallock rejoined, "it was very strange, as he was informed she was out on the street the day before, on the twenty-third

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of August." This ended the conversation, and Hallock left. Third. That he had made diligent effort to serve the summons, and had "watched said house, and for said defendant, and has been unable to serve her." Fourth. That he had been informed and believed, that Gilbert or his family have threatened to call a policeman, and have him or any person arrested, who should try to serve papers on the defendant, and that he believes the "defendant is keeping herself concealed so that personal service cannot be made." To the sufficiency of this affidavit several objections are made, which will be considered.

It is said that all the attempts, which had been made to serve the summons, were prior to the 1st of September, 1877, and, as the new Code took effect on that day, and not before, a case was not made out for the order. It is true that statutes are to have a prospective, and not a retrospective operation, unless otherwise declared, but this principle, as the provision of the Code is simply remedial, impairing no vested and existing rights, is inapplicable (*See note to page 164 of Potter's Dwarrris on Statutes, citing 1 Kent's Com., 455*). Nothing in the language of the section, or in the policy of the law, requires it to be narrowed as counsel claim. The right to make an order of substituted service upon a certain kind of proof, existed for the first time on the first day of September, and, as the law conferring it neither gives or takes away a right of action, but simply creates and gives from that time a new mode of serving process, there is no reason why full effect should not be given to its words, which permit an order for the new mode of service to be granted, on proof "that proper and diligent effort *has* been made to serve the summons upon the defendant," and "that he *avoids* service, so that personal service cannot be made." These facts must exist at the time of the application, as the language plainly imports, and nothing in the words imply that the avoiding of the service must have occurred after a certain date.

It is also claimed that the proof was insufficient, because

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the affidavit does not show that the father and mother of the defendant knew that Hallock wished to serve a summons, and that if it does, there is no evidence that the defendant knew of the attempt. The affidavit is clear, that Mr. and Mrs Gilbert knew that Hallock wished to see their daughter, for the purpose of handing to her a paper, which had to be delivered personally, and though she was in the house, the application was refused upon two different occasions, and on two different days. The questions propounded by Mr. Gilbert, as to whether Hallock was from Syracuse, and whether he knew McCarthy, show that he had a shrewd suspicion of the errand and he was not thrown off his guard by the negative answer of Hallock. The defendant could not be seen though the information was the paper should be personally delivered by the caller, and though Mr. Gilbert believed (as defendant's counsel argues) the statement of Hallock, that no errand in connection with a suit was the purpose of the desire to see the defendant. It is true, we cannot read the mind of Mr. and Mrs. Gilbert with absolute certainty, but to me the affidavit was "satisfactory proof," that both Mr. and Mrs. Gilbert intended to prevent the service upon, or handing to, the daughter, any paper whatsoever in behalf of the plaintiff. This intent was broad enough to include any summons, as was then and is now supposed. It is true, that there was no direct proof that the defendant knew of the calls by Hallock, and if this objection prevails, a party residing in a house has complete protection against the service of process. He has but to send father or mother to the door, or possibly a servant or relative, who will refuse all access, and when an order for substituted service is made, say, "you fail to prove that I knew of this." If, to the natural suspicions flowing from the relationship of the parties, force is given to the statement of the witness that he had "made *diligent* effort to serve said summons, and has watched said house, and for said defendant and has been unable to serve her," there was, if not direct, "satisfactory proof" that the defendant was a party to the

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conduct of her parents, which excluded the visitor, who had for her a paper, which required a personal delivery. The proof, in my judgment, upon which the order was founded was ample.

Upon the present motion, the defendant also claims that she has conclusively shown by her own affidavit, those of her father and mother, and the servant, Margaret Murphy, that there had been no attempt to avoid the service of any summons; that Hallock only claimed that he had a letter to deliver, and that "publicly and without any disguise, she went upon the streets for the purpose of taking exercise (in company with her mother) nearly, if not quite every day, from the thirty-first of July last, to the second of September, inst., when she went to New Jersey." Before alluding to the affidavits in reply, let us look, for a moment, at the admissions of these papers.

The defendant was *well* enough to walk daily in the public streets, and yet her parents were unwilling to have a simple "letter" delivered to her personally; *bold* enough to walk such streets daily when only accompanied by her mother, and yet afraid to admit the bearer of a letter to her presence, in her father's own house, in presence of both parents, because she "verily believed that said person was sent by her husband either to do her some bodily injury or to entrap her in some way into his power." The refusal to let Hallock see the defendant, to say the least, is not naturally accounted for, but let us look at some other facts proved on this motion by the plaintiff.

Mr. Lauren Redfield, an attorney at law, went to see the defendant on the afternoon of August 23, 1877, and told the servant his errand was with the defendant personally in regard to the matters with her husband. On being informed she was out shopping with her mother, he left word he would call that evening, but did not, sending Hallock. When Hallock, therefore, called that evening, it is safe to assume that the paper or letter which he wished personally to deliver, the parent's knew was concerning the husband's business.

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The incidents of that call have already been given. On the twenty-fifth of August, Hallock again went to the house. On the twenty-seventh of August, one William H. Church called, but failed to see her. On August 28, 1877, Mr. Redfield saw Mr. Davis, the counsel for the defendant, and desired him to appear in the action for the defendant. Davis wished to consult with her and her friends before so doing, and on August thirtieth he again saw Davis, who stated "that persons had been trying to serve said defendant, as he supposed, and insisted deponent would keep them away, and promised to appear in the action." On September first he again called, and at Davis' request made a slight change in the summons, to conform to new Code, and then Davis, through his clerk, copied the summons, but gave no formal appearance. On the third day of September Davis refused to appear in the suit, and stated the defendant was out of the city and state. On August 30, 1877, Mr. Davis wrote to Mr. Hiscock, one of the plaintiff's attorneys, that he was informed "by Mr. Gilbert that *several parties* have been annoying his daughter, Mrs. David McCarthy, by persistently calling for her under the pretense of having some private package or communication for her from some member of Mr. McCarthy's family." To this Mr. Hiscock replies, under date of August thirty-first, that he hardly understands the annoyances complained of; that he would like to procure "the service of a summons." On September 3, 1878 (which was Monday), Mr. Davis writes, admitting receipt of letter "on Saturday last" (September first), "but too late for reply." On Sunday, September second, the defendant went to New Jersey. Naturally, we ask, why this sudden journey on Sunday? Is it not reasonable to draw the inference that that visit throws light upon the past, and that the motive which denied to a person calling personal interview was identical with that which prompted a visit to New Jersey? It is, perhaps, in view of the positive allegations of the defendant, and her father and mother, uncharitable to draw the conclusion that there was any

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attempt by the defendant to evade the service of process, but the repeated attempts to see her, which were failures, the clear and positive intimations given that nothing could be delivered to the defendant except through members of the family, the careful and particular inquiries as to the object of the calls, the evident understanding of the family, as shown by the letter of Mr. Davis to Mr. Hiscock, of August 30, 1877, that those callers were for some errand from the plaintiff or his family, the unreasonableness of the excuse that fear of abduction or personal injury prompted the denial of the request to see her, and the sudden departure of the defendant to New Jersey, on a Sunday, which was the day after the reception of Mr. Hiscock's letter to Mr. Davis, and also the day after the call of Mr. Redfield upon her counsel, when the latter must fully have understood the object of the visit, satisfy me that the order for substituted service of the summons should not be vacated. No great injury can result to the defendant by a denial of this motion. The issues tendered by the plaintiff in the action must, in all human probability, be met. If the defendant meets them in Onondaga instead of New York, her rights will be as well protected as in the great metropolis, and any allowance which the court may order, to enable her to make a defense, will, doubtless, be measured by the cost of such defense to her.

The defendant lastly objects, that *the* summons, which was attempted to be served during August, was not the identical paper served under the order, and, consequently, if there was any attempt to evade the service of a process, it was not that one which was served. This objection is founded more upon the literal letter of an enactment, than upon its spirit and intent. The plain object of the Code was to give a remedy to a party desirous to bring a suit, which, without it, he could not do, because the party evaded the service of the summons. When the attempts to serve the paper were made, it was in the form prescribed by the old Code, which was about to give place to a new one. In the interview of September 1, 1877,

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between Mr. Redfield and Mr. Davis, as the new Code had taken effect on that day, the process was very slightly changed to meet the new requirements. It was still, even after the change, the old summons amended; and even if it had not been, it is not seen how that fact would have made any difference. The spirit of the Code is, that the party applying for the order of substituted service must show that the defendant has endeavored to avoid personal service of *the paper which will commence a suit*. The loss of the identical paper, which was attempted to be served, would not render nugatory these attempts at service which had been made. The fact of evasion would still remain, though the summons was lost; and upon the establishment of the effort to avoid the service the right to the order depends, and not upon the identity of the papers, so long as either, if served, would commence the same, and not a different action. This, it seems to me, is the plain meaning of section 435 of the Code, which should be interpreted so as to give efficacy to the remedy provided, and not be so construed as to prevent, by technical reasons, the granting of a relief which is obviously within its spirit. The maxim of the law, "the letter killeth, while the spirit keepeth alive," should be applied.

My conclusion is, that the motion to vacate the order of substituted service should be denied.

Struppmann agt. Muller.

N. Y. SUPERIOR COURT.

AUGUSTE STRUPPMANN and others agt. AUGUSTE MULLER and others.

Appeal — withdrawal and dismissal of — when attorney for infant plaintiffs will be compelled, personally, to pay costs for his misconduct in bringing an appeal.

Where an appeal has been withdrawn and dismissed by the general term on the consent of the *only* appellant, *no other party to the action* has a right to move the general term afterwards for an affirmance of the order or judgment appealed from. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal.

Where, after such dismissal, the attorney for infant parties to the action, who had no interest in said appeals, after having been informed by the general term that he appeared for a party who had no right to take any proceeding on that appeal, still prosecuted the appeal to the court of appeals :

Held, that he did it at his own risk, as if he were the appealing party, and should be held personally liable for the costs.

Special Term, June, 1878.

MOTION that the attorney for the infant plaintiffs pay the costs of an appeal to the court of appeals, personally, for his misconduct in bringing the appeal.

The plaintiffs, appellants, and the defendants, respondents, were infants.

The general guardian and guardian *ad litem* of the infant defendants Muller, on the 12th day of January, 1877, obtained leave to appeal to the general term of the superior court of the city of New York, from certain orders relieving purchasers from their bids under judgment sale herein, made by the said court. Before the opening of the appellate court, March fifth

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following, the appeal was discontinued without costs, by the parties appellants, and said purchasers, respondents, and an order to that effect duly entered.

Mr. Robertson, before judgment, had been attorney for Charles Struppmann in person, and Charles Struppmann as general guardian and guardian *ad litem* for the infant plaintiffs. There was no retainer after judgment, but as he continued to act all parties were notified by Mr. Struppmann, as guardian, &c., to serve no further papers upon him.

Mr. Robertson paid no attention to this, and although he was neither a party appellant or respondent to said appeal, which had been discontinued and order entered by the court and note of issue withdrawn from the general term clerk, he filed another note of issue, attended at the general term March 5, 1877, and upon the call of the case took an order affirming the orders appealed from with costs against the infant defendants.

The orders which he thus affirmed, among other things, ordered his own client, Charles Struppmann, to pay \$800 to the purchasers, respondents.

Upon the motion of the infant defendants, the next general term, on the 25th of June, 1877, vacated and set aside this order of March 5, 1877, and filed the following opinion :

General Term, May, 1877.

Before SEDGWICK, SPIER and FREEDMAN, JJ.

MOTION to vacate order.

FREEDMAN, J. — Upon proof that the appeals of the infant defendants, Muller from the orders of December 22, 1876, had been withdrawn pursuant to a stipulation entered into by the parties to said appeals, the general term, on February 23, 1877, granted an order dismissing said appeals without costs, and such order was duly entered.

This having been done, another party to the action, who

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had no interest in said appeals, not having in fact appealed, has no right to procure, at a subsequent general term, an order of affirmance of the orders of December 22, 1876 by default. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal. The order of March 5, 1877 should be vacated, and set aside."

From this order Mr. Daniel T. Robertson, without first obtaining leave of the court, or authority from Mr. Struppmann the guardian, appealed to the court of appeals on behalf of the infants, plaintiffs. Thereupon the appeal was not prosecuted, and the attorney for the infant defendants, respondents, served notice under Rules 2 and 7 of the court of appeals to file the return and print and serve papers on the appeal; this not being done, a motion was made in the court of appeals to dismiss the appeal with costs of appeal and motion, and that the attorney pay the same personally.

The court of appeals made the following decision: "Motion to dismiss appeal granted with costs. Motion to compel the attorney to pay costs, personally, must be made in the court below after the judgment has there been entered."

Judgment was thereupon entered in favor of the infant defendants, respondents, against the infant plaintiff, appellants for the sum of forty-eight dollars and nine cents costs of the appeal.

This motion was then made on behalf of both infants plaintiffs and defendants to compel Mr. Robertson to pay this judgment.

George F. Langbein, for the infant plaintiffs and defendants, for the motion argued:

I. That the infants being wards of the court, were under its special care and protection. That it would be a matter of great injury and injustice for the innocent infant plaintiffs to pay the said judgment, arising from an appeal taken without leave or authority, and that too, from a discretionary order which was not appealable. That it would be equally an injury and unjust

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for the infant defendants, not to be paid the expense and costs their representatives were put to by the willful acts and misconduct of Mr. Robertson.

II. The attorney was informed by the general term that he had no right to do what he had done, and still went further in the continuance of what he was judicially informed he could not do; he caused the costs and expenses of appeal, and should be held personally liable therefor (*People* agt. *Bradt*, 6 *Johns. Repts.*, 318; *see, also, Waring* agt. *Baret*, 2 *Cow.*, 460; *Anonymous*, 2 *id.* 589).

III. That the conduct of Mr. Robertson could not be ascribed to any other than improper motives. He certainly proceeded without just cause, and should be made liable to pay the costs and disbursements (*Matter of Kelley*, 3 *Hun*, 636; *Matter of Beckwith*, *id.*, 443).

IV. He should also be fined for his misconduct (*Livingston* agt. *Livingston*, 2 *Barb.*, 396).

Daniel T. Robertson, in person, in opposition, claimed that the proceedings in the action had been fraudulent, and that he had felt justified in appealing. That he had sent affidavits to the court of appeals in opposition to the dismissal of the appeal, and that he had appealed in good faith.

SEDGWICK, *J.* — At least, after the decision of the general term, the plaintiff's attorney was judicially informed that the attorney appeared for a party who had no right to take any proceedings on that appeal, and thereafter the attorney prosecuted the appeal to the court of appeals at his own risk, as if he were the appealing party.

The motion that the attorney is to pay the costs of the appeal to the court of appeals, is granted with five dollars costs. In other respects the motion is denied.

Order entered directing the attorney to pay the judgment for costs forty-eight dollars and nine cents, and five dollars costs, within fifteen days.

Clinton Liberal Institute *et al.* agt. Fletcher *et al.*

SUPREME COURT.

THE CLINTON LIBERAL INSTITUTE and ORIN PERRY *et al.*, agt.
LUTHER J. FLETCHER *et al.*

Injunction — not a proper case for — Code of Civil Procedure, sections 603, 604.

Where the papers submitted in opposition to a motion to dissolve an injunction fail to show how the rights of the plaintiffs are to be injured irreparably by the action sought to be restrained by the injunction, and where it appears that if the party whose election is sought to be restrained shall, after his election, threaten or attempt to do some act in violation of the rights of the plaintiff, they can then institute proper proceedings to guard against such injury as shall be imminent to it, the motion will be granted.

Plaintiff obtained an injunction order restraining the defendants, as an executive board of the State Convention of Universalists, from proceeding to elect a trustee to fill a vacancy occasioned by the death of one Barnum, who was a trustee of the Clinton Liberal Institute at the time of his death. The plaintiffs insist that the executive board have no power to fill the vacancy in the board of trustees; the defendants insist to the contrary:

Held, not to be a proper case for an injunction.

Oneida Special Term, May, 1878.

THE plaintiffs, on the 27th day of February 1878, obtained from a justice of this court an injunction order restraining the defendants, as an executive board of the State Convention of Universalists of the State of New York, from proceeding to elect a trustee to fill the vacancy occasioned by the death of one Barnum who was a trustee of the Clinton Liberal Institute at the time of his death. The defendants have appeared and denied the complaint in material parts and

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points. The defendants, upon their answer and affidavits, obtained an order, returnable at this special term, granted by the justice designated to hold this term. The order was therefore within the exception in respect to contested motions at the special term held with a circuit and it was made returnable at a day to suit the justice who was to hold the term.

Amos H. Prescott, for motion.

O. S. Williams, for plaintiff, opposed.

HARDIN, J. — There may be a debatable question involved as to the power of the state convention to delegate the appointment of a trustee to the executive board and also as to whether the convention has properly delegated such power; if it has the right to delegate the power, these questions will be involved in the final hearing of this cause (*Constitution of state convention, art. 4, sec. 3; By laws, art. 1, sec. 4; art 7, sec 1*). But the vital question involved in this motion is, whether this is a proper case for an injunction.

The plaintiffs insist that the executive board has no power to fill the vacancy in the board of trustees; the defendants insist to the contrary.

Suppose the executive board exercises what it supposes it has the right to, to wit, the power of appointment. Then, according to the position of the plaintiff, its action would be a nullity and the person thus named would not be in fact nor possess the powers and rights of a trustee.

Presumptively, if such is the correct construction as claimed to be by the plaintiffs, he would not be permitted to take his seat in the board of trustees nor to take part in their proceedings and deliberations; if he should attempt to do it his right so to do might be questioned by proper proceedings instituted for such purpose. Then, if the position of the defendants here is correct, it would be determined that he was entitled to sit; if, however, the position of the plaintiffs is correct it would be declared that he was not entitled to sit and act as a trustee.

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Section 603 of the Code provides that an injunction may issue (1) where the commission or continuance of an act would produce injury to the plaintiffs "an injunction *may be granted.*"

Section 604 of the Code provides for an injunction when the defendants are doing or threatening to do an act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual.

It is difficult to see, upon the papers submitted upon this motion, how the rights of the six male plaintiffs are to be injured irreparably by the action which the executive board may take in respect to a trustee to fill a vacancy. If they discharge their representative duty the action of a new trustee who was properly appointed could not injure them.

As to the plaintiff, the Clinton Liberal Institute, if an improper person shall be elected or if a person improperly elected or who claims to be a trustee by an appointment from a body not having the power to appoint, shall threaten or attempt to do some act in violation of its rights it can then institute the proper proceedings to guard against such injury as shall be imminent to it.

These views lead to the conclusion (1) that the six male plaintiffs have not made a proper case entitling them to an injunction order (2), that the plaintiff, the Clinton Liberal Institute, has not made such a case as the sections of the Code referred to require to entitle it to an injunction order like the one granted February 27, 1878. There may be doubt as to the plaintiffs having a common right in the whole seven to maintain this action but no opinion need be expressed upon that point upon this motion.

The motion is granted, with ten dollars costs.

Gulke agt. Uhlig.

N. Y. COMMON PLEAS.

HELENE GULKE agt. CHARLES UHLIG, HENRY G. UHLIG and
WILLIAM BUSSING.

Money paid voluntarily by administrator — when cannot be recovered — When general reputation insufficient to prove partnership — What is not reputation — Action should be in name of party as administratrix.

An administrator cannot recover, in an action at law, money overpaid to creditors, upon confidence that the assets of the intestate, which are in fact inadequate for the purpose, will eventually be sufficient for paying in full all claims against the estate. The remedy of the administrator is in equity.

Although the most conclusive proof is not required where defendants are sued as partners, there must be some proof of partnership.

Where the only proof of partnership was the evidence of the plaintiff who swore they were partners because "she knew it in business," "she had heard so," "everybody knew it," "and there was a sign on the store Uhlig & Co.," "she knew only two of the defendants, never saw and did not know the name of the third one," and which of the two defendants named Uhlig was the one she did not determine :

Held, that there was no direct evidence of defendants copartnership and no proper proof of reputation to that effect and the complaint should be dismissed for this reason.

An action to recover money claimed to have been paid by mistake of fact, by plaintiff (who was administratrix of her husband's estate), to defendants, should be brought on behalf of the estate and not in her own behalf.

General Term, March, 1878.

Before CHARLES P. DALY, C. J., JOSEPH F. DALY and
VAN HOESEN, JJ.

THIS action was brought to recover money claimed to have been paid by mistake of fact by plaintiff to defendants

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as partners. Plaintiff was administratrix of her husband's estate against which defendants had a valid claim. Of this claim plaintiff, without being obliged to do so, paid a portion. On the accounting before the surrogate it was shown the estate was insolvent at the time and that defendants had been paid more than their *pro rata* share, whereupon plaintiff sued to recover the overpayment. The testimony of plaintiff showed she paid "the money out of her own money" relying upon the estate realizing sufficient to reimburse her, which she believed it would do. The only proof of the partnership of the defendants was on the part of the plaintiff who swore they were partners because "she knew it in business" "she had heard so" "every body knew it" "and there was a sign on the store Uhlig & Co." but she also testified "she knew only two of the defendants, had never seen and did not know the name of the third one," and which of the two defendants named Uhlig was the one she knew she did not determine. Defendants offered no testimony, but moved for nonsuit on the ground the partnership had not been proved and that the payment was a voluntary one. The court below gave judgment for plaintiff from which defendants appealed.

Richard M. Bruno and *Charles Hagedorn*, for appellants.

Runkle & Englehart, for respondents.

VAN HOESSEN, J.— The defendants, Charles Uhlig, Henry G. Uhlig and William Bussing, are sued in this action as partners. There is absolutely no evidence, whatever, that they are partners. There is some evidence that there exists such a firm as Uhlig & Co., but who compose that firm the plaintiff did not undertake to prove. It is true that the most conclusive proof is not required where defendants are sued as partners, but certainly there ought to be some proof. No man can take up the evidence and say which of the Uhlig's is a partner in the firm or whether the defendants constitute such a firm or are associated in any way in business.

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No case can be found in England or in the state of New York, in which an administrator has recovered in an action at law money overpaid to creditors, upon confidence that the assets of the intestate, which are in fact inadequate for the purpose, will eventually be sufficient for paying in full all claims against the estate. The remedy of the administrator is in equity (*Story's Equity Jurisprudence*, sec. 90; 1 *Wait's Law Actions and Defenses*, p 168, sec. 5).

The case cited by justice MCGOWAN, in his very careful opinion, that of *Walker agt. Hill* (17 *Mass.*, 380), said, "that, at the common law, a creditor cannot be compelled to refund the amount of a debt paid to him by an administrator, though it turns out that there are not assets sufficient to pay all the debts."

It further concedes "that, if the administrator could not be compelled to pay the debt, he had no reason for making the payment, and ought not to be allowed to recover the money back." The Massachusetts court allowed the plaintiff in that case to recover, because, under the laws of that state, he could have been sued, and compelled by the defendant to pay.

To the suggestion that the administrator might have pleaded the insolvency of the estate, and thereby have defeated the suit, if one had been brought, the court said, "that the administrator had no right to set up insolvency, unless he had reason to believe that the estate was insolvent, and that, as the payment he had made was virtually compulsory, it would be allowing creditors of the estate to take money out of his pocket unless he were permitted to recover back from the defendant the amount of the overpayment." A legatee may always be compelled to refund when there is a deficiency of assets (*Lupton agt. Lupton 2 Johns., Ch.*, 614). The courts of New York have never yet adopted the rule of the courts of Massachusetts, and permitted an administrator to compel a creditor, in an action at law, to refund the excess he had received over his ratable share. In this case, I think, nothing was proved to warrant the judgment in favor of the plaintiff. Without any

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necessity for doing so, the plaintiff, of her own free will, gave the firm of Uhlig & Co. fifty dollars. She did not intend to donate the money, but she supposed she could get in assets sufficient to pay all the claims and was willing to take the risk of doing so. Unfortunate for her she did not know that the expenses of the administration would eat up \$640.79 of the whole estate, which footed up \$693.50, and that only fifty-two dollars and seventy-one cents would be left for the payment of all the creditors of the intestate.

I think the judgment should be reversed.

J. F. DALY, *J.* — There was no direct evidence of defendants' copartnership and no proper proof of reputation to that effect. This alone required the dismissal of the complaint. Plaintiff brought this action in her own behalf and not on behalf of the estate of which she is administratrix; the complaint should have been dismissed for that reason, even if, as administratrix, she could have recovered back from creditors of the estate, moneys paid them under the mistaken impression that she would realize from the estate enough to justify such a payment. I cannot say from the proof whether she claims to have paid the defendants from the funds in her hands as administratrix, or whether she advanced moneys out of her own moneys to make the payment. In the latter case, I do not see how she could recover such moneys back from the defendants, to whom she paid it in satisfaction of their claims against the estate, for it was simply an advance by her to the estate and not to the defendants. Her action, to be successful, must be brought as administratrix, and if she made out a case which would entitle her to recover formerly in equity, I see no substantial reason for denying the relief, a money judgment, in an action at law.

Judgment reversed. No bar to a new action.

Eleventh Ward Savings Bank, agt. Hay.

N. Y. COMMON PLEAS.

THE ELEVENTH WARD SAVINGS BANK agt. ALLEN HAY, DAVID
M. KOEHLER, and others.

*Consolidation of actions—What actions may be consolidated—When to
move—Laches.*

The statute authorizing consolidation of suits, *it seems*, does not relate solely to actions at law; suits in equity (*i. e.* foreclosure suits) may also be consolidated.

Where the motion for consolidation has been delayed until the causes are called for trial, the defendant will be deemed to have been guilty of such laches as to deprive him of his claim for this relief.

If a defendant wishes to have the suits consolidated, he should move before they are brought to trial, so that the other party may have an opportunity to read affidavits and be heard as upon an ordinary motion before trial.

The granting or withholding an order for the consolidation of actions, rests entirely in the discretion of the court in each particular case.

General Term, May, 1877.

THE action was brought to foreclose a mortgage made by Allen Hay to Joseph B. Hoyt for \$18,750 and interest payable in installments of \$3,750 each; an installment being payable on the first day of October in each year, commencing in 1868 and ending in 1872. The interest was originally six per cent, but by an agreement, dated October 31, 1868, the time of payment of balance of principal, *viz.*, \$15,000 then remaining unpaid, was extended for five years, and the interest increased to seven per cent. Hay, on the 31st of October, 1868, conveyed the property covered by the mortgage and located in the block in Avenue A and One Hundred

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and Fifth and One Hundred and Sixth streets, in this city, to the appellant, David M. Koehler, who assumed and agreed to pay the mortgage. This mortgage, and two others, each made by said Hay, one to Robert M. Streleigh and the other to Jacob Singmaster, upon all of which, together, there was then unpaid, in the aggregate, the principal sum of \$45,000 were assigned to the respondents by instruments dated August 18, 1869. Koehler, the appellant, who had so assumed the payment of the mortgages, and was the owner of the property, desiring to have some of this land released from the mortgages — the holders thereof having refused — applied to Mr. Edward V. Loew, to procure the negotiations of the mortgages to a person who would release. Mr. Loew was then the president of the bank (respondent) but also carried on the business of real estate broker, and had an office on Third avenue, in this city. Koehler called at this office in July, 1869, and stated to Mr. Loew that he wanted to procure a loan of \$45,000, and wanted to know if he could get it for him, agreeing to pay him if he succeeded \$5,000 for his services, and to cover compensation for examining the title. He tried several places and finally the bank agreed to take an assignment of the mortgages, which it did, actually paying \$45,000 for them. Koehler claims that he did not promise Mr. Loew \$5,000 for his services, but states that he was to pay \$5,000 in consideration of four lots of the land being released from the mortgages. In his answer to the complaint, he states his case somewhat differently, and in two different shapes, that is to say: At one part of his answer he claims that he, at the request of the plaintiffs, paid them \$1,666.67, to be applied by them towards the consideration they were to and did pay for the assignment of the bond and mortgage; afterwards, he states, it was in the form of a payment to them on account of the principal of the mortgage. At the time these bonds and mortgages were taken by the bank, Mr. Koehler made and delivered a bond to it, for \$45,000. On July 10, 1874, Mr. Loew having ceased to be president of

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the bank but being the president of the Manufacturers and Builders' Fire Insurance Company, who was the owner of a certain mortgage for \$11,000, on property in Henry street, which was then owned by Koehler, which mortgage being due and the company requiring payment thereof, Koehler requested Mr. Loew to see if he could not get the mortgage placed, and he got the bank to purchase the mortgage for \$10,000, Koehler paying to Mr. Loew \$1,000, which was the difference between the face of the mortgage and what the bank paid for it. This \$1,000 was paid over by Mr. Loew to the insurance company to make up for the loss on the sale. This mortgage was thereafter assigned by the bank to an estate. Koehler claimed that this \$1,000 was paid on account of the mortgages made by Hay, and that one-third of that sum, viz., \$333.33 should be credited upon each of them. After the assignment to the bank, and from October 2, 1869, down to November 1, 1875, Koehler paid to the bank interest on the whole principal sum remaining unpaid, although he claims that he had paid off \$6,000 thereof (first the \$5,000 and afterwards the \$1,000). The mortgage being due, this action was commenced April, 1876, the appellant Koehler only answering, and the only defense made by him was the payment of said amount; and the issue thus joined came on for trial before Hon. C. H. VAN BRUNT, one of the judges of this court, at an equity term thereof, October 16, 1876, who found in favor of the plaintiffs on all the issues in this action. At the trial the counsel for Koehler made a motion to consolidate this action with two others that were tried at the same time, which motion was submitted to the judge and decided by him, when he rendered judgment in the action, delivering the following opinion :

Special Term, November, 1876.

VAN BRUNT, J.—All the documentary evidence in this case is entirely inconsistent with the theory that Mr. Koehler

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paid the five thousand dollars (\$5,000) on the mortgages in suit at the time the plaintiffs took the assignment of them. If he made the payment on account of the principal of these mortgages, why did he execute a bond to pay forty-five thousand (45,000) dollars when the mortgages should become due?

Why did the bank give its checks for forty-five thousand dollars (\$45,000) to Koehler's own order, and Koehler indorse them over to the holders of the mortgages?

Why did Mr. Koehler draw his check to Mr. Loew individually and not to the plaintiffs?

In the face of these circumstances it seems to me certain that the payment was not intended to apply upon the principal of these mortgages.

The payment of the one thousand dollars (\$1,000) is equally well accounted for.

As to the strictures passed upon the conduct of the president of the bank, they cannot be considered here; whether he acted legally or illegally in taking the money, cannot in any case affect the plaintiff's claim.

The plaintiff is entitled to judgment of foreclosure and sale for the full amount claimed.

The only other question necessary to consider is that of consolidation.

If the motion to consolidate had been made properly, I think it would have been the duty of the court to have granted it, but in a case where such motion is delayed until the causes are called for trial it seems to me that the defendant has been guilty of such laches as to deprive him of his claim for this relief.

From the judgment the defendant Koehler appeals.

Joseph Bellsheim, for respondents. *N. C. Anderson* and *Albert Cardozo*, of counsel.

I. The statute authorizing consolidation of suits relates only to actions at law; foreclosure cases, being suits in equity,

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will not be consolidated (*See Statute: 2 Edmonds Stat. at Large, p. 398; 2 Waite's Pr., pp. 555 and 556*).

(a.) All the cases cited by the counsel for the appellants are suits at law, and it is confidently asserted that he can find none in equity.

(b.) The language of the statute shows that it was the practice at law, and not in chancery, that the legislature was regulating. •

At all events, the great delay in making the motion was a sufficient reason for its denial, for the statute provides that the court may, in its discretion, if it shall appear expedient, order the consolidation.

Kaufman, Tunstall & Wagner, for appellants.

DALY, C. J. — The first question raised in this case, a question of fact, was whether the \$5,000 was paid upon the mortgage or to Loew in consideration of his getting the plaintiffs to take the mortgage. Upon that question, Koehler and Loew were in direct conflict, and although the conduct of Loew, as the president of a savings bank, and one of the finance committee of the institution in advocating in the committee, and getting the bank to take a mortgage of \$45,000, for which service Koehler was to pay and did pay him \$5,000, was extraordinary in the chief officer of such an institution; yet we cannot say, as between the witnesses who directly contradicted each other that the judge below decided erroneously, as he put his decision upon the ground that Koehler at the time gave his bond for \$45,000, when if the \$5,000 had been received by the bank as a payment upon the mortgage, the bond should have been in \$40,000; as well as upon another equally significant circumstance that the bank drew the check for \$45,000 to Koehler's own order, and he endorsed it to the owner of the mortgage and he drew his check for \$5,000 to Loew individually instead of to the bank.

These cotemporaneous documentary facts and the continu-

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ous payment afterwards to the bank by Koehler of interest on \$45,000 were circumstances strongly against his version of the transaction, and we cannot say that the judge was wrong in attaching to them the weight which he did.

As respects the second question of fact Loew testified that Koehler gave the \$1,000 as a bonus to the insurance company to secure the transfer of the other mortgage to the plaintiff, and that he, Loew, when he received it, paid it over to the insurance company and Koehler's statement in respect to this transaction was so loose and unsatisfactory, as to justify the judge in finding against him. If the defendant wished to have the suits consolidated, he should have moved before they were brought on for trial. The usual course is to move before trial, that the other party may have an opportunity to read affidavits and be heard as upon an ordinary motion before trial. It was a matter of discretion with the judge, and as he put his denial of the motion upon the ground of the defendant's laches, there is no reason why an appellate tribunal should now order the suits to be consolidated (*Wait's Pr.*, vol. 2, pp. 557, 558).

The motion for a new trial, therefore, should be denied.

The judgment and order appealed from are affirmed with costs (ten dollars costs and disbursements of affirmance of order).

J. F. DALY and VAN HOESEN, J., concurred.

NOTE. — An appeal was taken to the court of appeals and on April 16, 1878, the court affirmed the judgment, with costs.—[Ed.]

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N. Y. COMMON PLEAS.

Action No. 1.

THE ELEVENTH WARD SAVINGS BANK agt. ALLEN HAY
and others.

Action No. 2.

SAME agt. SAME.

Action No. 3.

SAME agt. SAME.

Mortgage foreclosure — three mortgages on same premises, bearing even date and recorded at same time — Actions commenced and judgment entered at same time — Equality of liens — power of court to order moneys distributed pro rata.

It is the duty of the court to distribute moneys received at judicial sales.

After moneys have been paid into the hands of court's officers, the court must see that they reach those entitled to them. The court, and not a referee appointed to execute the judgments of foreclosure, must determine the priority of liens.

If liens be equal in rank, the power of the court to protect that equality is not impaired by any error which a referee may have fallen into in making a sale.

If fraud, misconduct, surprise, or well grounded misapprehension has prevented the sale of the property for the price that ought to have been obtained, or if for any other reason it should be inequitable to permit the sale to stand, a resale will be ordered.

But where no one applies for a resale, and where all parties are content that the sale shall stand, and where justice can be done without a resale, the court will not order one of its own motion.

Where *three* actions were each commenced to foreclose a *separate mortgage of equal date, lien and time of record and amount of purchase-money* upon the *same parcel* of land, said three mortgages having been originally made to secure the separate amounts due to each of the joint grantors of said lands. The actions were numbered 1, 2 and 3. *Three*

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separate judgments have been entered, all of which bear date November 20, 1876, and filed on November 22, 1876. The referee appointed in and by said judgments to sell the mortgaged premises, on the day advertised for said sale, offered the same for sale under the judgment in action No. 1, and the premises were sold for \$34,500. Afterward the same premises were offered for sale under judgment No. 2, and were struck off to the same purchaser for \$250, and immediately thereafter the same premises were again offered for sale by the referee under judgment No. 3, and were struck off to the same purchaser for \$250. On petition of one of the sureties for the payment of said mortgaged debt, asking that an order be made in said actions directing the referee to apply the amount of the proceeds of the sales under said judgments proportionably to each:

Held, first, that, no one of the mortgages had any priority over the others, and the referee should not be permitted to give precedence to one of the judgments, simply because he finds it marked No. 1. The court itself had no power to give that judgment or that mortgage priority.

Second, It is the duty of the court to protect the equality of liens where it exists, and, in performing that duty, the court will look behind the proceedings of the referee to the transaction out of which the liens arose.

Third, These three mortgages being equal liens, equity requires that the money received at the sale should be divided among them proportionably.

Fourth. The sureties are entitled to make the petition. The plaintiff could demand such a division, and the sureties, by right of subrogation, may demand it likewise. They are bound by the judgments in these actions, and on paying the mortgage debt to the plaintiff they will become entitled to all the securities for that debt which the plaintiff possesses.

Fifth, Although the petitioner has not paid the debt, he is liable to pay it, and "the same equity which enables a surety, after payment by himself, to recover the amount from his principal, warrants him to file a bill to compel payment by the principal, when he has been brought under liability, by the debt falling due, though he may not have been actually sued." Under this principle, the petitioner is not prematurely applying for relief.

Special Term, June, 1878.

I. IN these three cases the mortgages, bonds and decrees, and all subsequent proceedings, stand upon an exact equality as respects all the parties and the subject-matter of the suit.

II. The petitioner, besides being a purchaser, is adjudged

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liable to pay any deficiency arising on the sale, by reason of his having guaranteed the payment of the bonds and mortgages.

III. The purchaser was compelled to buy in under the second and third sale to save complications with other possible purchasers.

IV. The referee instead of selling under all three judgments at the same time, sold under them separately in the order of their number and sold three times. The sale under No. 1 brought \$34,500, under the others \$250 each, leaving in No. 1 a surplus of some \$8,000 besides taxes.

V. Without instructions from the court the referee will apply all the purchase-money to the extinguishment of the first judgment in number notwithstanding all were alike in equity.

VI. On appeals in the three cases there were bonds given (to pay deficiency arising on sale of mortgaged premises) in this court to the extent of \$750 and Ernest Ohl and H. Eisner were sureties. They have notice of this application.

VII. Pending appeals, interest accrued on the judgment to a large amount and the property depreciated largely.

VIII. The petitioner and his co-guarantees were not parties to this appeal. It was taken against their interest.

IX. The petitioner in his own behalf, as one of the guarantees liable for deficiency by the judgment, claims to have the purchase-money applied *pro rata* in these judgments so that the sureties on the appeal may be called on to respond to the extent of their liability for this deficiency which has been almost, if not quite, entirely created by the appeals.

The defendant David M. Koehler owned the mortgaged premises; Allen Hay was the original mortgagor; the defendants, Heller (the petitioner) and the two Zinns, had guaranteed payment of the mortgaged debt; Koehler alone defended and after judgment alone appealed to the general term and again to the court of appeals; Eisner and Ohl were his sureties on the appeals, and the value of the mortgaged premises had so

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depreciated by the delay occasioned by these appeals, that there was a prospect of a large deficiency. By applying the whole of the purchase-money to the first judgment, or the judgment in action No. 1, until it was paid the liability of the sureties on the appeals for deficiency on it, would have been extinguished, which the petitioner deemed a prejudice to him (*See S. C. ante* 438).

Lewis Johnston, for defendant Heller the petitioner.
Albert Mathews, of counsel.

I. Equality is equity, and the judgments being equal liens, the guarantors have the right to have the purchase-money arising on sale applied equitably whatever may be the ulterior results (*Campbell agt. Ruger*, 1 *Cov. Rep.*, 215).

II. The guarantors have a superior equity that this money be applied on all the judgments alike so that the obligors on the appeal, may be compelled to pay so far as liable on account of the deficiency that has arisen out of an appeal taken without their privity and against the interest of the guarantors.

III. The necessity of this application arises out of an ill advised proceeding on the part of the referee in selling under the three judgments separately instead of jointly (*Snyder agt. Stafford*, 11 *Paige R.*, 76).

IV. It was against equity and contrary to the practice of courts of equity to permit three suits to be prosecuted on these three mortgages by the same party against the same parties and the court is bound at any stage of the case, upon the suggestion of any party, to suppress the mischief and prevent any further injustice therefrom (*Roosevelt agt. Elvithorp*, 10 *Paige R.*, 419; *Newman agt. Ogden*, 6 *Ch. Decisions*, 40; see *Potter agt. Crandell*, 1 *Clarke Ch. R.*, 119).

V. On a decree of foreclosure and sale, this court will always regulate the subsequent proceedings to prevent injustice (*Van Nest agt. Yeomans*, 1 *Wend. Rep.*, 88; *Suffern agt. Johnson*, 1 *Paige R.*, 450; *N. Y. Life Ins. Co. agt.*

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Cutter, 3 *Sand. Chy. R.*, 176; *Gregory* agt. *Campbell*, 16 *How. Pr.*, 417; *Livingston* agt. *Milldrum*, 19 *N. Y. R.*, 440; *Mu. Life Ins. Co.* agt. *Salem*, 3 *Hun's R.*, 118; *Mu. Life Ins. Co.* agt. *Bowen*, 47 *Barb. R.*, 682).

VI. The direction of the court is indispensable in this case to prevent the referee applying the whole of the purchase-money in the first judgment and thereby allowing (1st), the act of injustice of giving this large amount of surplus to the subsequent incumbrancers and (2d), the still greater mischief of leaving the guarantors against deficiency to pay a much larger demand in the cases Nos. 2 and 3, than is just or equitable.

VII. The petitioner and his co-guarantors have a right to ask this court, in its equitable disposal of this matter, to direct this money (purchase-money) to be applied *pro rata* upon each mortgage judgment. Any other disposition of the fund will work injustice.

Joseph Bellesheim, for the plaintiffs in the three actions and the sureties on the appeals in the actions. *Albert Cardozo*, of counsel.

Kauffman, Tunstall & Wagner, for defendant Koehler. *Sigismund Kauffman*, of counsel.

VAN HOESEN, *J.*—Hay, bought a piece of land, and to secure the payment of a part of the purchase-money, gave three mortgages of the same date and amount, which were all payable at the same time, and all filed for record at the same instant. Three mortgages were made, because there were three venders of the land, every one of whom chose to have a security, which he could sell at his own pleasure without consulting other persons, and the interest upon which he could collect for himself without being at the trouble of a division with the other two mortgagees. The three mortgages were liens of equal rank in all respects. They were all

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transferred to the Eleventh Ward Savings Bank, the plaintiff in these three actions. Hay sold the land to David M. Koehler, who assumed and agreed to pay the mortgages; afterwards, Abraham Heller, Abraham Zinn and Solomon Zinn, by an instrument under seal, guaranteed the payment of the principal of the mortgages at maturity, and of the interest as it should from time to time accrue. For non-payment of the principal at maturity, the plaintiff undertook the foreclosure of the three mortgages. It is not at this time worth while to express an opinion as to the propriety of the plaintiff's course in bringing three different actions of foreclosure when all three mortgages should, according to the settled practice of the court, have been foreclosed in one action. The plaintiff brought three actions and obtained judgment in all. From the three judgments, David M. Koehler appealed, first to the general term of this court, and afterwards to the court of appeals. Koehler did not give the usual undertaking to stay proceedings pending the appeal, but gave instead, with the plaintiff's concurrence, three bonds of indemnity, one in each suit, providing for the payment of any deficiency arising upon the sale of the mortgaged premises under the judgments of foreclosure. Ernest Ohl and Henry Eisner were the sureties on all three indemnity bonds. The judgments of foreclosure were all affirmed by the general term of the common pleas and by the court of appeals. The referee appointed to execute the judgments, then proceeded to sell the property. He did not sell under the three judgments at one and the same sale, but assuming that the judgment which the plaintiff had, for convenience, called No 1, ought to be executed first, he sold the entire property under that judgment for \$34,500. He afterwards made another sale of the same property under the judgment called No 2, and thereafter made a third sale under the judgment called No. 3. The same person who had bought the property at the first sale, bought at the second and third sales, bidding \$250, each time. The entire sum bid at the three sales is \$35,000. The taxes, assessments and water rates

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due upon the property amount to about \$15,000, and must, as well as the cost of the three actions be paid out of the \$35,000 before the residue can be paid to the plaintiff. It is estimated that there will be a deficiency of \$18,000, for which judgment will be entered against Hay, Koehler the Zinn Brothers and Heller. Heller alone comes in and asks that the referee be instructed to divide such of the proceeds of the sales under the three judgments as may be coming to the plaintiff, among the three judgments proportionally. To that objection is made by Ohl and Eisner, the sureties on the indemnity bonds, and by Mr. Koehler. The counsel for Mr. Koehler contends that the court cannot take the money bid at one sale and distribute it as if it had been paid on different sales, and that the only power the court has is to order a resale in case it be adjudged that the referee did injustice by making a separate sale under each judgment instead of selling under all three judgments at one time. Counsel for Ohl and Eisner contends that the court cannot divide the money among the three judgments without great injustice to the sureties on the indemnity bonds. These sureties it is agreed are bound to pay any deficiency arising under the judgments. There will not be any deficiency at all under judgment No. 1, and there will be a comparatively small deficiency under judgment No. 2. If the \$34,500 bid at the first sale be applied to the payment of the judgments in the order in which the referee proceeded to execute them, for the small deficiency under judgment No. 2, and for the large deficiency under judgment No. 3, Ohl and Eisner are content to be held responsible. If, however, the money bid at the first sale be divided proportionally among the three judgments, there will be a deficiency in each case, and Eisner and Ohl will be compelled to pay all three indemnity bonds. Fortunately for them the amount of each bond is only about \$750. Counsel further contended that the court would alter and increase, or rather would be attempting to alter and increase, the liability of the sureties, Ohl and Eisner, if it

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should order the division of the money among the three judgments. I have no doubt of the power of the court to distribute these moneys among the judgments. It is the duty of the court to distribute moneys received at judicial sales, after moneys have been paid into the hands of court's officers. The court must see that they reach those entitled to them. The court must determine the priority of liens. If liens be equal in rank, the power of the court to protect that equality is not impaired by any error which a referee may have fallen into in making a sale. The mistake of the referee may or may not require that property should be resold. If fraud, misconduct, surprise or well ground misapprehension has prevented the sale of the property for the price that ought to have been obtained, or if for any other reason it would be inequitable to permit the sale to stand, a resale will be ordered. But, here no one applies for a resale; all parties are content that the sale shall stand, and if justice can be done without a resale, there would be no sense in the court ordering one of its own motion. I find that no one of the mortgages had any priority over the others; why, then, should the referee be permitted to give precedence to one of the judgments because he finds it marked No. 1? The court had no power to give that judgment or that mortgage priority; shall the error of a referee effect what the court is powerless to accomplish? As I have said it is the duty of the court to protect the equality of liens where it exists, and in performing that duty the court will look behind the proceedings of the referee to the transaction out of which the liens arose. These three mortgages being equal liens, equity requires that the money received at the sale should be divided among them proportionably. The plaintiff does not, however, apply for such a division. It is of no importance to the plaintiff whether this application be granted or not, all the money to be paid will, in any event, go to the plaintiff, and the amount will neither be increased or diminished by ascribing it ratably to the three mortgages. To the petitioner it is a matter of no little

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importance. He is one of the sureties for Koehler, and is bound by the judgments in these actions. On paying Koehler's debt to the plaintiff, the sureties will become entitled to all the securities for that debt which the plaintiff possesses. The indemnity bonds are a part of those securities. If the plaintiff would enforce the payment of those bonds the guarantors of Koehler's mortgage debts will become entitled to enforce them if they pay that debt. The petitioner, like Mr. Hay and the Messieurs Zinn, needs for his protection that the moneys be so divided among the mortgages that he will not be deprived of such security as the indemnity bonds afford. The plaintiff could demand such a division, and the sureties, by right of subrogation, may demand it likewise.

In *Story's Equity Jurisprudence* (10th edition, sec. 499a) it is said: "Where the principal in a bond had been sued and gave bail and judgment was obtained against the principal and also against the bail by the creditor, and afterwards the sureties on the original bonds (who had counterbonds) were compelled to pay it and then brought their bill in equity to have the benefit of the judgment of the creditor against the bail by having it assigned to them; it was decreed, accordingly, so that although the bail were themselves but sureties as between themselves and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held that they likewise came in the room of the principal debtor as to the sureties on the original bond. The original sureties had no direct contract or engagement by which the bail were bound to them, but only a claim against the bail, through the medium of the creditor, to all whose rights and the power of enforcing them, they were held to be entitled."

The case of *Bronson agt. Thomas* (2 Jones' Eq., 414) is a strong authority to the same effect (See, also, *Barnes agt. Mott*, 6 Daly, 150).

It is true that the petitioner has not paid the debt, but he is liable to pay it; and in *Adam's Equity* (p. 270) it is said: "The same equity which enables a surety, after payment by

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himself, to recover the amount from his principal, warrants him to file a bill to compel payment by the principal, when he has been brought under liability by the debt falling due, though he may not have been actually sued."

Under that principle it seems to me that the petitioner is not prematurely applying for relief. The disposition of the money that Eisner and Uhl desire would embarrass if not entirely thwart him in obtaining the full benefit of subrogation.

I am not unmindful of the fact that Heller alone presents this petition, though Hay and the two Simms have an interest in the matter at least equal to his; but they have all received notice of this application and the granting of it will inure to their advantage. Heller ought not to lose his rights because others do not care to assert theirs.

I see nothing in the objection that the contract of the sureties on the indemnity bond would be altered, and that gross injustice would be done to them by dividing the moneys proportionally. The contract of those sureties was made with reference to the existing law and practice of the court. If those rules require, as I think they do, the proportional distribution of the moneys, the burden of the sureties is not increased by carrying out the rules. The sureties agreed to pay the deficiency, what that deficiency is the court must determine upon equitable principles and in conformity with its practice.

The application is granted.

People *ex rel.* Seery agt. Police Commissioners.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* MICHAEL SEERY agt. THE BOARD OF POLICE COMMISSIONERS OF THE TROY CITY POLICE.

Board of police commissioners of the city of Troy — Power to remove members of the force — how and when may be removed.

Under the act to establish and maintain a police force in the city of Troy (*Laws of 1870, chapter 520, sec. 1*), no member of said force can be removed except upon "*written charges*" and a *public hearing and examination* by the board of commissioners after due notice.

Where a member, upon no specific charges, though asking for a copy of charges against him, and for time to procure testimony, "*was summarily dismissed*" by the board of police commissioners, on oral charges for neglect of duty, and inefficiency in the discharge thereof, * * * on oral reports touching said neglect of duty and inefficiency, made by the superintendent and captains of the police force to said board:

Held, that the action of the board of police commissioners, in removing such member, was illegal, and must be reversed.

Nor is such removal legal and valid under the act of 1876 (*Laws of 1876, chap. 80, sec. 7*), which act is amendatory of that of 1870. Under the provisions of this act there must be a *trial*.

After-occurring events cannot legitimately be made a part of a return to a *certiorari* brought to review certain determinations and conclusions of a board of police commissioners as to the dismissal of a member of the police force. The return should only set out the proceedings sought to be reviewed. Any statement by the commissioners, as to what the relator did after his pretended removal, has nothing to do with the question sought to be reviewed.

Albany Special Term, August, 1878.

COMMON law *certiorari* to review the proceedings of the board of police commissioners of the city of Troy, in removing the relator from the police force of said city.

People *ex rel.* Seery agt. Police Commissioners.

Henry A. Merritt, for the relator.

R. A. Parmenter, for the respondents.

WESTBROOK, *J.*—In August, 1874, the relator, Michael Seery, was regularly appointed a patrolman upon the police force of the city of Troy. On the 23d day of May, 1876, upon no specific charges, the relator, though asking for a copy of charges against him and for time to procure testimony, "was summarily" dismissed "on oral charges, for neglect of duty and inefficiency in the discharge thereof * * * on oral reports touching said neglect of duty and inefficiency, made by the superintendent of the police force, and captains of police force to said board." "No witnesses were sworn on said trial or investigation, nor were said oral charges controverted or disproved except by his oral denial thereof." This dismissal, the relator claims, was illegal, and seeks to reverse upon this proceeding, which is by a common law *certiorari*.

Section 11, of chapter 520 of Laws of 1870, entitled "An act to establish and maintain a police force in the city of Troy," contains, among others, the following provision: "All officers and members of the police department, subject to removal for cause as hereinafter specified, shall hold their offices during good behavior, or as each shall well and faithfully observe and execute all the rules and regulations of the said board, the laws of the state and the ordinances of the city of Troy. Any member of said force may be removed from his office only after written charges shall have been preferred against him, according to the rules and regulations of said board, and the same shall have been publicly heard and examined by said board after the notice to him, thereof, by said board, in manner to be prescribed by said rules and regulations."

There is some question whether the regulations of the board, which were in fact made, are before the court upon this pro-

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ceeding. Their introduction, however, is entirely unnecessary to show the illegality of the removal of the relator, so far as the same depends upon the sections of the statute we have quoted. That law plainly requires "*written charges*," and a *public hearing and examination* by the board after due notice. Confessedly the charges were oral, and "oral reports" to the board, which the relator and the public never heard, which the board assumed to be true by requiring the relator to disprove them, and because, by a refusal of time to procure evidence, he was only able to deny them by his own statement, a summary dismissal was made, was so clearly a departure from the statute law as to need no argument.

It is claimed, however, by the respondents, that, under section 7 of chapter 30, of the Laws of 1876, the removal was legal and valid. The act of 1876 is amendatory of that of 1870, and its seventh section amends section 22 of the latter act, by adding thereto these words: "But nothing in this act contained shall be so construed as to prevent the said board of police commissioners from summarily arraigning and trying any member of said police force, or clerk, surgeon or detective under said board of police commissioners for insubordination, disobedience of orders, rules or regulations, or neglect of duty, or for intoxication or misbehavior while on duty. The charge shall be stated to said delinquent, either orally or in writing, and, if on investigation the charge shall, in the opinion of said board of police commissioners, or a majority of them, be sustained, the said board shall have power, and it shall be their duty, to dismiss such person from service, and to appoint another person in his stead, any thing in the act to which this act is an amendment to the contrary notwithstanding."

It must be observed that the amendment speaks of "summarily arraigning and trying any member of said police force * * * for *insubordination, disobedience* of orders, rules or regulations, or *neglect of duty*, or for *intoxication or misbehavior while on duty*." Oral reports unheard by the

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accused, an assumption of their truth in advance of a hearing, and a call upon the relator on the spot and instant to disprove unspecified general charges, followed by an immediate dismissal, because the relator could not do an impossibility, may be a summary proceeding, but no man can call it a *trial*, and such it must be, if the action of the board can be sustained. It is somewhat questionable whether a general charge of "*neglect of duty and inefficiency in the discharge thereof*" is covered by this amendment, but, assuming that it is, it is also very clear that there has been no trial as is plainly required.

It is further answered by the respondents that the relator has acquiesced in the decision, and that his place is now filled. Granting the truth of the return in this respect, it is not seen how after-occurring events can legitimately be made a part of such return. The *certiorari* is brought to review a certain determination and conclusions of the board, and the return should only set out the proceedings sought to be reviewed. If, after the decision of the board was made, the relator has acquiesced in such removal (the only evidence of acquiescence is the delay of nearly two years in bringing this proceeding), such acquiescence must be set up as a defense to a future proceeding by the relator for his pay. It can form no defense here, and the return of the respondents is no evidence upon that question, because they have only been required to return their own official action. Any statement by them as to what the relator did after his pretended removal, has nothing to do with the question sought to be reviewed. These declarations in regard to the after-occurring conduct of the relator, is no higher evidence thereof than the certificate of any other party. The writ was obtained within the time prescribed by law, and full force and efficacy should be given to it.

The action of the board of police commissioners in removing the relator was illegal, and must be reversed.

Matter of Hogan.

SUPREME COURT.

IN THE MATTER OF HOGAN.

Justices of the peace — power to amend mittimus after imprisonment — what mittimus should contain.

A justice of the peace may amend his *mittimus* after a defendant has been imprisoned on it.

A *mittimus* issued by a police justice or a justice of the peace on a conviction for petit larceny, which simply states the offense, conviction and judgment thereon, without averring the jurisdictional facts, is sufficient.

At Chambers, Rochester, July, 1878.

HABEAS CORPUS.

Hogan is detained by the superintendent of the western house of refuge under a *mittimus* issued by the police justice of the city of Rochester on a conviction of, for petit larceny. Before the writ was served the police justice made sundry amendments to the *mittimus*, but they were made after Hogan had been imprisoned several months, and after the copy of the *mittimus* had been furnished, which is annexed to the petition for the suit.

George Raines, for Hogan.

E. B. Fenner, district attorney, opposed.

ANGLE, J.—MR. justice E. DARWIN SMITH and county judge JEBOME FULLER, of this county, having, as I am informed by justice SMITH, held, in cases before them, that a justice of the peace might amend his *mittimus* after the defendant has

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been imprisoned on it, I shall follow their holding without an examination of the question. The counsel for the prisoner raises the following objections to the *mittimus* as it has been amended:

First. It contains no recital that a warrant was issued against Hogan.

Second. There is no recital that Hogan was ever brought before a magistrate as a magistrate.

Third. There is no recital that an examination before a magistrate was either had or waived.

Fourth. No recital that the charge was stated to Hogan before the magistrate, and that he plead to it.

Fifth. No recital that there was any complaint on oath of any person against Hogan, preliminary to the warrant or trial.

Sixth. The words, "property of the Union News Company," did not describe the property of any person; if it were a corporation, the fact of incorporation should be stated in the *mittimus*.

Seventh. It is not stated that the property was then and there the property of the news company.

Eighth. It is not stated in the *mittimus* that it was the first offense of petit larceny.

Ninth. The word "taken" is omitted in the recital of the stealing of the property. The case of *The People* agt. *Phillips* (1 *Park. Crim. R.*, 95) was a summary conviction under the statute relating to disorderly persons, and it has been followed by a number of cases since, under statutes providing for summary proceedings, the last of which cases is the *Matter of Travis* (17 *Alb. Law J.*, 31).

The case now before me does not arise under a summary conviction, but in the ordinary course of criminal proceedings, and as to which there is a statute not applicable to convictions on summary proceedings; or, if applicable, no notice was taken of it in the cases referred to. I allude to 2 Revised Statutes, 717, section 38, which declares what the record of

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conviction shall contain, namely, "It shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof and to whom paid." In *The People* agt. *Moore* (3 *Park. Crim. R.*, 465) this statute and its effect upon the form of the *mittimus* came under consideration, and the court say (page 466,) "Such being the only essential requisites of the record of the judgment as prescribed by the statute, I am unable to see how any greater minuteness or particularity can be required in the *mittimus*, which is merely the writ of execution to carry the judgment into execution. Admitting that the court of special sessions is a tribunal of special and limited jurisdiction, and that the facts conferring jurisdiction must be shown, the statute has changed the rule in express terms. Now, a record which states not one of these facts is made 'sufficient.' The execution certainly cannot be required to state any more than the judgment. By implication the necessity of averring the jurisdictional facts in the writ is dispensed with by the provision that the record need not set forth these facts." In *Gray's Case* (11 *Abb.*, 56), which was a conviction under the vagrant act, it is said *obiter*, after citing *People* agt. *Morris*, "in a commitment for petit larceny it is enough to state the offense, without reciting the goods stolen or the owner of the property."

I conclude that the above cited statute, as construed in the cases referred to, disposes of the objections raised, and my duty is to remand the prisoner.

Watrous agt. Elmendorf *et al.*

N. Y. COMMON PLEAS.

CHARLES WATROUS and CHARLES H. WILSON agt. JOHN P.
ELMENDORF *et al.*

Mechanic's liens — what complaint must show — effect of death of contractor.

There can be no lien unless the seller and the purchaser *both* understand, at the time of the delivery, that the materials were to be used upon a particular building, which the purchaser intended to construct, alter or repair.

The complaint must show that materials were furnished *for*, as well as used *in*, the building covered by the lien.

The death of the contractor will not prevent a sub-contractor from filing a valid lien.

It is not necessary to set out in the complaint a recital of all that is contained in the claim filed with the county clerk. It is sufficient to allege, generally, that the plaintiff had filed the notice mentioned in the fifth section of the act (*lien law of 1875*), without specifying all the details which ought to have been stated in that notice.

Special Term, September, 1878.

Sheldon & Browne, for motion.

Pelton & Poucher, opposed. *S. F. Kneeland*, of counsel.

VAN HOESEN, *J.* — A defendant demurred to the complaint and the plaintiffs moved for judgment upon the demurrer as frivolous. On the argument both parties requested me to treat the matter as though the demurrer were regularly brought on for argument at special term, and not to dispose of it as a motion under section 537, Code Civil Procedure. The lien law of 1875 provides that a lien may exist in favor

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of a person furnishing materials to be used in the construction, alteration or repair of any building. The pleader did not allege that the materials were furnished to be used, but contented himself with averring that one Ribon owned the land; that Ribon contracted with one King for the erection of the house; that King contracted with Schofield to do the carpenter work on the building; and that in performing that contract Schofield bought the materials for which the claim is made, and then used them in completing the carpentering work on the house.

It appears to be well settled by authority in other states, and I think it is the law in this state, that there can be no lien unless the seller and the purchaser both understand, at the time of the delivery, that the materials were to be used upon a particular building, which the purchaser intended to construct, alter or repair (*See cases in secs. 5, 7, et seq., Kneeland on Liens*).

By the rules of evidence, where goods are actually furnished and used in the building, there will be a presumption that they were furnished under a contract that they should be so used (*Sec. 58, Kneeland on Liens, citing Power agt. McCord, 36 Ill., 214; Martin agt. Ensore, 36 Ill., 222*). But the rules of pleading are not satisfied by the averment in a complaint of mere matters of evidence, however strongly they may tend to prove the issue which the pleader is bound to maintain (*Pomroy's Remedies and Remedial Rights, sec. 526*). The plaintiff's allegations are of facts which he will offer as evidence, to show that Schofield and Watrous contemplated the use of the materials in the construction of the very building upon which a lien is claimed. Those facts — important as they will be as evidence — are not a competent substitute for the necessary averment in the pleading that the materials were furnished to be used in the building in question. There can be no better illustration of the distinction I am endeavoring to point out than that given by Pomroy in the section I have cited from his work. "If, instead of

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directly averring that the defendant executed a written contract, the plaintiff should allege that the defendant had admitted his signature to be genuine, or that persons familiar with his handwriting declare the signature to be his, it is plain that neither of these allegations would present a material issue, that is, an issue upon which the cause of action would depend." So, in this case, the question is not whether Schofield actually used, in this building, materials sold by the plaintiff, but is, whether the plaintiff Watrous sold the materials to Schofield that the latter might use them in putting up this very house. A fact necessary to constitute a cause of action must be alleged, unless the law intends it (1 *Chitty on Pleading*, p. 222). And there is certainly no legal intendment that this particular house was in the minds of Watrous and Schofield when those materials were furnished. Upon this ground, therefore, the demurrer is well taken.

The defendant's second ground of demurrer is not tenable. The case of *Tilfer agt Kiersted* (2 *Hilton*, 577), an authority which I am bound to follow, expressly decides that the death of the contractor, after the completion of the work, does not deprive a material-man of the right thereafter to file a notice of claim, and acquire a lien for materials furnished at the request of the contractor.

The third ground of the demurrer is not, in my opinion, tenable. It was not necessary to set out in the complaint a recital of all that is contained in the claim filed with the county clerk. The complaint first alleges that "the claim filed was in the manner and form required by the act of 1875," and then proceeds to say that it contained the names and residences of the claimants, and divers other particulars which the law requires the claim to contain. It fails to allege that the claim stated the terms, the time given and the condition of the contract, or that all the materials contracted for had been furnished. If the complaint has proposed to set out all that the claim contained, or if a copy of the claim, which appeared to be defective for want of essential statements, were

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attached to the complaint, there would, I think, have been good ground for a demurrer, but it was sufficient to allege, generally, that the plaintiff had filed the notice mentioned in the fifth section of the act, without specifying all the details which ought to have been stated in that notice. "The object of the pleadings is to arrive at a specific issue upon a given and material fact, and this is attained, although the evidence of such fact, to be laid before the jury, be not specifically developed in the pleadings." It was always sufficient to allege that a thing was done "in a reasonable time," or that a defendant "had notice," although the facts which showed the time to be reasonable, or the facts which showed the notice to be valid, had all to be proven specifically on the trial, that the court might pass upon them (1 *Chitty's Pleading*, 225).

The motion for judgment is denied, with ten dollars costs.

Matter of North American Life Insurance Company.

SUPREME COURT.

IN THE MATTER OF THE NORTH AMERICAN LIFE INSURANCE
COMPANY OF NEW YORK.

*Life insurance company—appointment of receivers—duty of actuary—
compensation of actuary.*

The duties of an actuary appointed by a receiver of an insurance company pursuant to the provisions of the act (*Laws of 1869, chap. 902*), relate only to those specified in section 8 of the act, and terminates with his report, unless such duties are continued by the court, and the compensation which is to be paid must be fixed by the court, and is not under the control of the receiver, superintendent of insurance, or actuary.

Albany Special Term, June, 1878.

MOTION by Emerson W. Keyes, the actuary appointed by the receiver, in regard to his compensation and his discharge.

Mr. Keyes, in person.

R. W. Peckham, for the receiver.

WESTBROOK, J.—Mr. Henry R. Pierson under the provisions of chapter 902, of the Laws of 1869, was appointed receiver of The North American Life Insurance Company. On the 28th day of March, 1877, such receiver, by and with the approval of the superintendent of the insurance department, in conformity with section 8, of said act, appointed Emerson W. Keyes, the petitioner and applicant, actuary. On the 3d day of October, 1877, the actuary made a report to

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the court as required by said section and act. The special term has instructed the receiver to act in conformity with the conclusions of the report, from which order an appeal has been taken to the general term, which appeal is still pending. The petitioner claims that such report was a mere preliminary one, and since its presentation he has been engaged in a further examination of the affairs of the corporation and intends to present another and further report which he supposes his duty requires him to do. The compensation of the actuary was originally fixed at \$5,000 per year by the receiver with the concurrence of the superintendent of insurance. On the 1st day of February, 1878, the compensation of the actuary was reduced to \$2,000 per year and continued at that sum through the months of February, March and April last, and on the twenty-fourth day of said month of April, the actuary was prevented by the receiver from further prosecuting his duties. The actuary insists that the receiver could not lower his compensation nor discharge him, and now applies to the court for relief.

The proper disposition of this motion depends upon the duties of the actuary under the statute aforesaid. What are these duties? The language of section 8 cannot be misunderstood, and its requirements are best expressed in its own words. He "shall make a careful investigation, according to the standard fixed by the laws of this state, into the condition of said company, and report thereon, in writing, under oath, to said court and receiver." The section then prescribes the action to be taken upon such report. If the report shows that the assets of the company can meet its obligations as they mature, "and if said actuary's report shall be confirmed by the court," the receiver shall carry on the company's business as the section directs. If, however, the report of the actuary is against the ability of the assets to meet obligations, the section is silent as to any approval of the court or any action by it, and it is then declared "the said receiver shall notify the said superintendent thereof, and the superin-

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tendent shall, with the consent and advice of the treasurer of the state and in such manner as the said receiver, superintendent and treasurer, or a majority of them, shall determine, sell and convert said securities into money," and then the receiver shall, with the moneys thus obtained, proceed to discharge and pay the obligations of the company as the section directs. No other section or provision of the act (*chapter 902, Laws of 1869*) under which Mr. Keyes was appointed, prescribes for him any other duties. Section 10, of such statute, provides, in case the business of the company is continued by the receiver, for an annual examination of its affairs "by a competent actuary appointed by the superintendent of the insurance department," and section 13 declares: "The receiver may employ such clerks and actuaries as he may deem necessary for the proper conducting of his business as such receiver." From the fact, then, that section 8 defines what the actuary appointed thereunder shall do, and no provision being elsewhere made for the doing of any thing more or further by him; from the fact that section 10 provides for the annual appointment of an actuary, also, for a specified purpose; and lastly, because section 13 provides for the appointment, by the receiver, of "such clerks and actuaries as he may deem necessary for the proper conducting of his business as such receiver," my conclusion is, that the duties of Mr. Keyes were limited and confined to those prescribed by that section.

The next question which the motion presents is, when did Mr. Keyes' duties cease? The section provides only for a single report "to said court and receiver." This is evident, for the section so expressly declares: "If it shall," is the language, "by *said report*, be found," &c., referring to the provision in the same sentence which requires the actuary to "*report*" on "the condition of said company * * * in writing, under oath, *to said court and receiver*, and hence there can be no foundation for a construction requiring a separate report to each. With the making of the report, the

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right of the actuary at will to continue the work ends. It is possible that the report made may be incomplete or may require correction. The right to a supplemental or amended report is doubtless involved by necessary implication, for, when made, it would be deemed a part of the report required, and a condition of things can be readily imagined when such supplemental or amended report should be ordered. Who, however, is to determine that need? Not the actuary, for if employment and occupation depend upon his will, it may never cease. Not the receiver, for possibly his interests may require the truth to be suppressed. The statute is silent and any limitations upon the work of the actuary after the presentation of his report, or a continuation of his labor for the purpose of a supplemental or amended report must depend, it seems to me, upon the order or direction of the court. This conclusion is reached because the right to limit or continue the work of the actuary must reside somewhere, and in the absence of any statute regulation it must rest with the power to which is committed the duty of administration upon the assets of the corporation, which power is the court. Without an order, then, from the court, it is held that the duty of the actuary ended with his report, and if the same was to be continued permission so to do should have been obtained.

It is argued, however, that supplemental reports have been received, and by his petition the actuary informs the court, that in, his judgment, an additional or supplemental report is, in this instance, required. When referees have made supplemental reports, they have, in some instances, been accepted by the court, and such reception is an adoption of the act, and equivalent to an original order to do it; and it is possible that if the court have received one from the actuary, it might have been recognized as proper and legitimate. In the absence, however, of any order or permission to continue work, and without a direct application for that purpose, which will directly present its need, the court cannot and

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ought not to say, that the work of the actuary should continue.

The application also presents this question, who must fix the compensation of the actuary? Upon this point the statute is also silent, section 13, to which allusion has already been made, and which permits the receiver "to employ such clerks and actuaries as he may deem necessary for the proper conducting of his business as such receiver," of which number we have already held that the actuary to be appointed under section 8 is not one, only provides that "the *said* clerks and actuaries," that is to say those appointed under section 13 "shall be paid such reasonable compensation as he may determine, subject, however, to the approval of the superintendent of the insurance department." There is, so far as we have discovered, no provision as to the mode or amount of compensation to an actuary who holds an appointment similar to that of Mr. Keyes. Certainly his services ought not to be gratuitous, and as his duties are independent of the receiver, and judicial in their character, the receiver should not fix his compensation, and thus measurably control his action. Neither has the superintendent of insurance any power in the premises, for none is conferred by law, and he has no duties to discharge in connection with the winding up of the company, which would confer upon him by necessary implication any such power. We are, therefore, again compelled to answer, that the absence of any statutory direction, the proper independence of the actuary, and the general powers and duties of the courts in the premises, make it, and it only, competent to fix the compensation.

Our views, then, to summarize them, are: The actuary's duties relate only to those specified in section 8 of the act we have considered, and terminate with his report unless such duties were or are continued by order of the court, and the compensation which is to be paid must be fixed by the court, and is not under the control of the receiver, superintendent of insurance or actuary. As the motion now made was not

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so framed as to ask leave of the court to make a supplemental report, or so as to present, sharply, the need thereof, or the value of the services rendered, and as the views herein expressed differ somewhat from those of the actuary, and of the receiver, the present application will be denied, without costs, and without prejudice to the right of Mr. Keyes to ask the court for leave to continue in his labor, and to fix the amount of compensation for past or future services.

French agt. Maguire.

SUPREME COURT.

SAMUEL FRENCH and another agt. THOMAS MAGUIRE.

Copyright — Injunction — Jurisdiction — Unpublished manuscript — right to, when and how protected — what proof necessary to authorize the issuance of an injunction.

The supreme court of this state has jurisdiction and authority to grant an injunction, at the suit of a resident plaintiff, against a non-resident defendant, restraining him from performing or exhibiting a drama, in a foreign state, in violation of plaintiffs' rights, where the summons and the injunction order are served on defendant, while he is temporarily in this state.

The Constitution of this state has given this court general jurisdiction in law and equity. And, under so broad a grant of authority, where it regularly acquires, by the service of its process, control over the parties, it must have authority to adjudicate upon their rights, in actions of this description. All that is required for that purpose is to affect and restrain their action, and that may properly be done wherever the party to be affected may be found and served with process. It is not an exercise of mere local, but an element of general, jurisdiction.

An omission by a defendant, to deny facts which are entirely and peculiarly within his knowledge, will be regarded as sufficiently confirming them, to justify the court in acting upon the hypothesis of their truth.

Where the plaintiffs alleged that they had acquired title to the unpublished drama, known as "Diplomacy," for the purpose of producing and exhibiting it within the United States, and that, in violation of their rights, the defendant is about producing it in a theater controlled by him in the city of San Francisco; then setting forth the agreement or contract of sale:

Held, that the fact that the sale relied upon in support of the action was made, may properly be assumed from the agreement which appears to have been so authenticated as to establish the fact of its genuineness.

As a general proposition, it is legally true, that mere information as to the existence of the rights relied upon will not justify the issuing of an injunction. But when the informant is beyond the power of the court

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because of his residence in a foreign country, and where action more prompt than is consistent with the long delay necessary to obtain the affidavits of these foreign informants is required for the protection of the plaintiffs' rights, the court may act upon this information and issue an injunction, especially where the information itself is sustained and rendered entirely credible by circumstances well established in the case.

To protect a person in the possession of an unpublished manuscript, the law does not require that it shall be the exclusive work of one individual. It may be that of one or many, acting in co-operation, and, whichever may be the case, the right is substantially the same, and the person is equally entitled to the protection of courts of justice. The same reasons that will induce security to the individual will extend it to all whose joint action may contribute to the result finally attained.

By the common law, authors were protected in the enjoyment of the pecuniary benefits of their literary productions.

The law still continues to maintain and protect the right of the author to his unpublished manuscript or composition, the same as it formerly did, independent of the statutes concerning copyrights.

Exhibiting the manuscript or composition to others, or, where it may be adapted to that end, performing it by theatrical representations is not deemed sufficient to constitute the publication which will deprive the author of his exclusive right.

Reading, exhibiting or performing, will permit the observer to appropriate to himself so much as his memory may be capable of retaining.

But it will not allow the hearer and observer to appropriate and use the entire composition, with its incidental stage accompaniments. That right is in the author and his assignee.

Special Term, August, 1878.

MOTION to continue the injunction order restraining the theatrical performance or exhibition of the play or drama known as "Diplomacy."

A. J. Ditenhoefer, for plaintiffs.

Charles W. Brooke, for defendant.

DANIELS, J.—The plaintiffs reside in the city of New York, and the defendant is a resident of the city of San

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Francisco, in California. He was served with the summons in this action and also with the injunction order while he was temporarily in the city of New York. And as the order restrained him from performing or exhibiting this drama in the city of San Francisco, it has been strenuously urged that this court has no jurisdiction of the case, but if the plaintiffs' rights were in danger of being infringed by the threatened or apprehended act of the defendant, redress should be alone sought for in the courts having unquestioned jurisdiction over that locality. It was considered at the time of the argument that this objection was not well founded, and further reflection has only served to confirm that conviction. When the adverse party is found within this state its courts have no right to decline to respond to the appeal of its citizens for redress and direct them to go abroad for that justice which they may properly obtain at home. It would impose a hardship upon them which no court would have the right to create, simply because it would result in promoting the convenience of the defendant.

The Constitution of this state has given this court general jurisdiction in law and equity (*Const. art. 6, sec. 3*). And under so broad a grant of authority, where it regularly acquires, by the service of its process, control over the parties, it must have authority to adjudicate upon their rights in actions of this description. All that is required for that purpose is to affect and restrain their action, and that may properly be done wherever the party to be affected may be found and served with process. It is not an exercise of mere local, but an element of general, jurisdiction.

The authority of courts of equity over controversies arising beyond the limits of their local jurisdiction received an early examination in the case of *Massie agt. Watts* (6 *Cranch*, 148), and it was there held, as the result of the authorities, that in cases "of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may

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be affected by the decree" (*id.*, 160), and this principle has since been acted upon as entirely sound in cases arising within this state (*Sutphen agt. Fowler*, 9 *Paige*, 280; *Bailey agt. Ryder*, 10 *N. Y.*, 363; *Newton agt. Bronson*, 3 *Kernan*, 587; *Gardner agt. Ogden*, 22 *N. Y.*, 327; *Story's Equity Jur.*, vol. 2, sec. 899). Under the authority sustaining the existence of the jurisdiction of the court in cases of fraud, trust and contract irrespective of the actual residence of the parties or the place in which the controversy originated, it may clearly be held to include the present case; for, as it has been charged, it is one of fraud, and the defendant has been regularly subjected to the jurisdiction of this court by the personal service of the summons upon him.

In support of the action it has been alleged that the plaintiffs have acquired title to the unpublished drama known as "Diplomacy," for the purpose of producing and exhibiting it within the United States, and that, in violation of their rights, the defendant is about producing it in a theater controlled by him in the city of San Francisco. Other allegations are contained in the complaint for the purpose of supporting these claims, but they finally result in the affirmation of these facts. It has been objected, on the part of the defendant, that the allegations made have not been based upon sufficient knowledge to justify the assumption of their truth, and for that reason no case has been made for an injunction. This objection must be chiefly considered as affecting the proof of the plaintiffs' title, for the defendant has in no way denied the charge that he has announced his design and intends to produce and exhibit the drama in his theater in San Francisco; and the omission to deny facts so entirely and peculiarly within his knowledge must be regarded as sufficiently confirming them to justify the court in acting upon the hypothesis of their truth. This is a well established rule in the law of evidence. It is founded on sound reason and justified by human experience (*People agt. Doyle*, 26 *N. Y.*, 578; *Gordon agt. People*, 33 *id.*, 501, 508, 509). The point simply

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remains under this objection, whether the evidence of the plaintiffs' title has been sufficiently presented to justify the issuing of an injunction for its protection. The papers show that to have been acquired from Squire Bancroft, a resident of London, in England, by means of a contract made between him and the plaintiffs. By this contract Bancroft, in terms, sold, assigned, transferred and set over unto the plaintiffs "for the United States of America, the play known as 'Diplomacy,' which is an original adaptation of Victorien Sardou's play 'Dora,' written and composed by Saville Rowe and Bolton Rowe of London, and the original manuscript of said play, and all the right, title and interest of said party of the first part, and of the author of said play, in and to the said play and said original manuscript, which is herewith delivered to said party of the second part." The contract then proceeded to state that the play was an original version, composed and written by the Rowes, that it had not been published, printed or dedicated to the public, and that the vendor would protect the title of the plaintiffs to such play and manuscript. And for that they agreed to pay fifty dollars in cash for each performance of the play at Wallack's Theater, New York. That the sale relied upon in support of the action was made, may properly be assumed from the agreement which appears to have been so authenticated as to establish the fact of its genuineness. Whether it was an original unpublished play, owned by the vendor when he made his agreement for its sale, are the remaining facts to be considered on this portion of the case. The existence of these facts has been alleged from information stated to have been derived from Sardou, as the original author, and from Bancroft as his vendee, under whose employment the play was adapted to the English and American stage.

As a general proposition it is legally true that mere information as to the existence of the rights relied upon will not justify the issuing of an injunction (*Hecker agt. Mayor, &c.*, 28 *How.*, 211; *Hall agt. Bond*, 22 *id.*, 272). But this, like

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many other general rules, cannot be of universal application. An exception to it has always existed in cases where it was made to appear that the affidavit of the informant could not be obtained. Courts of justice require the best evidence which it may be in the power of the party to produce. To require more than that would, in many instances, be a denial of justice. For that reason, where the informant has refused to make an affidavit stating his knowledge of the facts affirmed by him, courts have deemed themselves, in proceedings of this nature, justified in acting upon his information. The reason of the rule was that the party supplied the best evidence in his power. That no longer exists now where the informant is within the state, for the law has provided the means for compulsorily obtaining his affidavit. But when the informant is beyond the power of the court, because of his residence in a foreign country, these means are entirely unavailable. Then the preceding rule must be appealed to and applied so far as may consistently meet the emergency of the case. And the reason of it would relieve the party applying from the necessity of obtaining the affidavits of such informants when immediate action was required for the protection of their rights. Such an emergency appeared in this case. Defendant resided, and was engaged in the execution of the apprehended purpose, in another state. Action more prompt than was consistent with the long delay necessary to obtain the affidavits of these foreign informants was required for the protection of the plaintiffs' rights. And if their information could not be properly acted upon, the plaintiffs would necessarily be deprived of redress. Under such circumstances and in such an emergency, the reason of the rule requiring the best evidence before action could ordinarily be taken, justified its relaxation. The plaintiffs presented the best evidence in their power, and on that the court could, under the peculiar circumstances existing, act with propriety.

But even if that could not be done, the plaintiffs' application should not, on that account, be allowed to fail. For

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the information itself was sustained and rendered entirely credible by circumstances well established in the case. And from them it appears that there never has been in the literature of the French stage any other play resembling that of "Dora," as it was originated and composed by Sardou. And that there has been no other play resembling or known by the title of the play of "Diplomacy." That the first of these plays has been attended with great success for a long time while it was performed in Paris. And the second, known as its adaptation, under the title of "Diplomacy," has met with similar success in London, and also in the city of New York, where, for seventy nights, it was performed at Wallack's theater. It has not been in terms stated that these performances were under the liberty or auspices of the respective persons claiming title to the composition. But that may be readily and reasonably inferred from the fact that in neither place has it been shown that any person appeared with any conflicting claim of title. And the fact that both were so exhibited is very decided evidence of right; for possession of property of this description, as of that more tangible in its nature, is evidence that the possessor is in fact the owner.

The contract made with the plaintiffs and the allegation of the fact in their complaint, also shows that the original manuscript of the play of "Diplomacy" was delivered with the agreement to them. And that very decidedly confirms the fact of their possession. Then it appears that the defendant negotiated with, and endeavored to purchase the play from, them and offered them the sum of \$700 for the right to produce it at his theater in San Francisco. This was not an offer to settle any existing dispute, but to purchase from them what the offer necessarily conceded they had the power and right to sell.

The case has been reasonably well made out; as completely so as it probably could be, when it is remembered that the evidences of the original title can only be fully supplied by taking the depositions of witnesses in foreign countries, which

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cannot be done in this state of the case, but which it is highly probable will sustain the plaintiffs' right when they can be obtained. The proof was, under its peculiar circumstances, sufficient to warrant the injunction so far as it was dependent upon the evidence of the facts themselves (*Campbell agt. Morrison, 7 Paige, 157*).

It has, however, been further objected that even if the facts set forth should be found to be sufficiently established, that the injunction would still be incapable of being sustained, because the title to such relief would not even then be properly made out. But the facts that Sardou appears to have claimed the play of "Dora," and that his claim was not disputed while it was performed in Paris; that Bancroft claimed to have acquired it from him, and after procuring it to be adapted to the English stage, had it performed in London, and then, as the contract states and the complaint discloses, sold and delivered it with the original manuscript to the plaintiffs, under whose authority it was for a long time performed in New York, together with the defendant's endeavor to purchase it from them, are sufficient, *prima facie*, to establish the origin and title as they have been alleged. Sardou appears to have been the original author and composer of "Dora," and with his authority Bancroft procured it to be so far changed as to become the English drama "Diplomacy." That was "Dora" adapted to the English and American stage. And in the adaptations made the same originality appears to have entered as in the composition of the original play. So far as the play of "Dora" was retained, the ideas and their mode of expression were those of Sardou translated into English. When that play was changed it was done so by the labor and originality of the Messrs. Rowe, who transferred their work to Bancroft, under whose employment it had been performed. And by these two processes the play of "Diplomacy" was originated, and as so originated it became the property of Bancroft, who transferred it to the plaintiffs.

To protect a person in the possession of an unpublished

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manuscript of this description the law does not require that it shall be the exclusive work of one individual. It may be that of one or many acting in coöperation, and whichever may be the case the right is substantially the same, and equally entitled to the protection of courts of justice. The same reasons that will induce security to the individual will extend it to all whose joint action may contribute to the result finally attained.

It was very early the policy of the common law to protect authors in the enjoyment of the pecuniary benefits of their literary productions. And these probably extended so far as to include the unlimited right of publication and sale. But this was afterwards so far changed, on account of the statute of Anne, by the decision made in the house of lords in the case of Becket and Donaldson, as to exclude the author's right after publication. That was considered an abandonment of the author's exclusive right; and since then it has been protected after publication only under the laws providing an exclusive copyright. An instructive history of the contest attended with this result will be found in *Curtis on Copyright*, (49-68). But it only deprived the author of his exclusive right after publication. Before publication it has continued to be maintained the same as it was first assured. And the law still continues to maintain and protect the right of the author to his unpublished manuscript or composition the same as it formerly did, independently of the statutes concerning copyrights. And exhibiting the manuscript or composition to others, or, where it may be adapted to that end, performing it by theatrical representations, have not been deemed sufficient to constitute the publication which will deprive the author of his exclusive right. Reading, exhibiting or performing will permit the observer or hearer to appropriate for himself so much as his memory may be capable of retaining. But it will not allow the hearer and observer to appropriate and use the entire composition, with its incidental stage accompaniments. That right still remains in the author and

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his assignee. And it has generally been maintained when the subject has been formally brought to the judicial attention of courts of equity. In this respect all literary compositions have been placed substantially upon the same foundation (*Hoyt* agt. *Mackenzie*, 3 *Barb. Chy. Rep.*, 320; *Woolsey* agt. *Judd*, 11 *How. P. R.*, 49, 55, 56; *Wheaton* agt. *Peters*, 8 *Peters*, 591, 657; *Palmer* agt. *Dewitt*, 47 *N. Y.*, 532). In this last case these principles were evidently considered to be the settled law; and that of itself should secure the continuance of this injunction (*Story on Equity Jur.*, vol. 2, section 950). The motion made on behalf of the plaintiffs must be allowed to prevail; and the usual allowance of costs should be made to them.

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SUPREME COURT.

THE STEUBEN COUNTY BANK agt. JOHN L. ALBERGER, SAMUEL F. ALBERGER, impleaded, &c., and LOUISA F. ALBERGER a creditor.

Attachment—motion by judgment creditor to vacate—right of plaintiff to oppose by new affidavits—Code of Civil Procedure, sections 682, 683.

Where a motion is made by a judgment creditor of defendant to set aside plaintiff's attachment, granted prior to recovery of judgment (upon an affidavit showing that she has acquired a lien upon the property of defendant), because of the insufficiency of the affidavits on which it was granted, the plaintiff may offer new proof, by affidavits, sustaining the grounds for attachment recited in the warrant.

For this purpose a lienor must be regarded as included in the term "defendant" as used in the first clause of the second sentence of section 683.

A motion to vacate an attachment on the ground of the insufficiency of the affidavits on which it was granted, can be made by a defendant only. A mere lienor can only move to vacate upon affidavits on his own part, in which case the plaintiff may oppose such motion by new proofs, limited, however, to such proof as tends to sustain the ground for the attachment, recited in the warrant, except in the case specified in the last clause of section 683.

It seems, that the new Code is to permit a lienor to vacate an attachment which stands in his way, on any ground formerly open to him, or upon affidavits controverting those upon which the attachment was issued, but not upon the ground of irregularity.

Fourth Department, General Term, June, 1878.

APPEAL from an order made at Monroe special term, February 5, 1878, denying the motion made on behalf of Louisa F. Alberger, a judgment creditor of Samuel F. Alberger,

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to vacate an attachment as to the property of Samuel F. Alberger.

Plaintiff recovered judgment in this action December 4, 1877, for \$14,087.23. The referee rendered his decision in favor of plaintiff, November 28, 1877, and on the 29th, day of November, 1877, an attachment was issued by the county judge of Steuben county against the property of Samuel F. and John L. Alberger, upon affidavits tending to show that they were about to transfer their joint and individual property to defraud the plaintiff; and this ground was duly recited in the warrant.

On the 30th day of November, 1877, the sheriff of Niagara county seized a large amount of the real and personal property of the defendant, Samuel F. Alberger, and still holds the same. On the 4th day of December, 1877, judgment in this action was entered and docketed in Steuben county, and on the same day a transcript thereof was docketed in Niagara county, and an execution issued thereon and delivered to the sheriff of Niagara county.

On the 3d day of December, 1877, the day before the time for entering plaintiff's judgment, but three days after the levying of plaintiff's attachment, the defendant, Samuel F. Alberger, conveyed all his real estate, amounting in value to about \$10,000, to his mother, Louisa F. Alberger, and on the same day confessed a judgment in her favor for \$9,760, which was docketed in Niagara county clerk's office on the morning of December 4, 1877, a few hours before plaintiff's judgment was docketed in that county, and an execution on Mrs. Alberger's judgment was, at the time of docketing her judgment, issued to the sheriff of Niagara county. On the 21st of December, 1877, a motion was made upon affidavits of Louisa F. Alberger and others on behalf of the defendants, John L. and Samuel F. Alberger, before Mr. justice DANIELS, to vacate said attachment, which was denied. Louisa F. Alberger then moved as a judgment creditor of Samuel F. Alberger upon an affidavit setting out her judgment, &c., to

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vacate the attachment as to the property of Samuel F. Alberger for alleged insufficiency of the original affidavits upon which the attachment was granted. In opposition to this motion the plaintiff produced and read upon the argument various affidavits, deeds and papers, by which the intent of the defendant, Samuel F. Alberger, to dispose of his property was overwhelmingly proved.

The facts so alleged were the same used to oppose the motion made on behalf of defendants before judge DANIELS, as before stated. They show that the said transfer to Mrs. Alberger, and the confession of judgment to her, were without any consideration. The confession of said Samuel F. Alberger under oath, that the sole purpose of making them was to prevent the collection of plaintiff's debt; and that said defendant intended, in case he was unsuccessful in the action, to make such disposition of his property within the four days after the decision, before judgment could be entered upon the referee's report, under the new Code, as would prevent plaintiff from reaching it. The court, at special term, allowed these additional affidavits and papers to be used in opposition to the motion, and denied the motion without deciding whether or not the original affidavits were insufficient.

The following is the opinion of the special term.

Monroe Special Term, January, 1878.

A. C. Rice, for motion.

J. K. Parkhurst, opposed.

ANGLE, J. — The creditor moves, under section 682 of the Code of Civil Procedure, upon an affidavit showing that she has acquired a lien upon the property of defendant, S. F. Alberger, to vacate plaintiff's attachment because of the insufficiency of the affidavits on which it was granted. In opposition, the plaintiff offers new proof, by affidavits sustain-

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ing the grounds for attachment recited in the warrant. The counsel for the creditor objects to such new proofs insisting that as the affidavit on his part does not controvert any of the facts or grounds on which the warrant issued, as they appear from the affidavits on which it was grounded, the plaintiff cannot resist this motion with new affidavits to sustain those grounds.

The section, 683, of the Code of Civil Procedure provides that the motion "may be founded only upon the papers upon which the warrant was granted * * * * * or it may be founded upon proof by affidavit on the part of the defendant in which case * * * * * it may be opposed by new proof by affidavit on the part of the plaintiff."

In applying the second sentence, or alternative, in section 683, I must hold this as a motion "*on the part of the defendant*" within the meaning of that sentence, for if it be not so construed, a lienor has no right to move on affidavits, and while the construction gives him the right so to move, it also gives the plaintiff the right to oppose such motion by new proofs. This motion, then, is founded on proof by affidavit on the part of the defendant, and the fact that such proof is limited to simply showing that the person moving has a lien which entitled him to make a motion, does not, in my opinion, limit the opposing affidavits on the part of the plaintiff to the same matter, but it opens to the plaintiff the right to sustain, by further affidavits, the warrant on any ground recited in it.

The affidavits on the part of the plaintiff are, therefore, admitted and they sustain the warrant even if the original affidavits did not (*a question I do not decide*).

The motion is denied, but as the question is a new one, it is without costs.

The following is the opinion rendered at general term :

SMITH, J. — Mrs. Alberger's motion at special term to vacate the plaintiff's attachment, was founded upon an affidavit stating that after the property of Samuel F. Alberger was

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attached by the plaintiff, she acquired a lien upon it by attachment, and the ground of her motion was the alleged insufficiency of the affidavits on which the plaintiff's attachment was issued. In opposition to the motion, the plaintiff offered new proof, by affidavits, sustaining the ground for attachment alleged in the warrant. The counsel for Mrs. Alberger objected to such new proof, insisting that as the affidavit on her part did not controvert any of the facts or grounds on which the plaintiff's warrant issued, the plaintiff could not resist the motion with new affidavits.

The additional affidavits taken in connection with the original affidavits on which the plaintiff's attachment was issued, established, beyond doubt, the ground recited in the warrant of attachment, that the defendants, John F. and Samuel L. Alberger, were, at the time of issuing said warrant, about to assign, dispose of, or secrete their property with intent to defraud their creditors. If, therefore, the additional affidavits were properly received, it will follow that the order appealed from should be affirmed. The question of the admissibility of the new affidavits involves the construction of section 683 of the Code of Civil Procedure, relating to the attachment of property, read in connection with section 682.

Section 682 provides that "The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, * * * may apply to vacate or modify the warrant," &c. Section 683 provides that "An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof, by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff,

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tending to sustain any ground for the attachment, recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial."

The meaning of these sections, so far as the question presented is concerned, is not entirely clear. The counsel for Mrs. Alberger contends that the right to attack the validity of an attachment by controverting the facts stated in the affidavits on which it was granted, is confined to the defendant in the action and that, consequently, the plaintiff has no occasion to resort to new proof in support of his attachment, and should not be permitted to do so, except in the case of a motion by the defendant to set it aside upon controverting affidavits; that the right of a lienor, not a defendant, to attack the validity of the attachment, is limited to a motion to vacate it because of the insufficiency of the affidavits on which it was granted; and that he would be deprived of his right to move on that ground, if the reading of an affidavit on his part, showing that he is such lienor, which is necessary to give him a standing in court, entitles the plaintiff to support his attachment by fresh affidavits.

The construction contended for on the part of the plaintiff is, that a motion to vacate an attachment on the ground of the insufficiency of the affidavits on which it was granted, can be made by a defendant only; and that a mere lienor can only move to vacate upon affidavits on his own part.

The latter view was adopted by the judge who held the special term, and we are inclined to think it is correct. Section 682, gives, in general terms, the right to the defendant, or a lienor, to move to vacate, &c., the attachment, without prescribing, in what way, or before what court or officer it shall be done. Those particulars are provided for by the next section, which manifestly relates to a motion by a lienor, as well as to a motion by the defendant. The subject of its provisions

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is "an application, specified in the last section." It provides for two classes of applications; one, founded only upon the papers upon which the warrant was granted; the other founded upon proof, by affidavit, on the part of the defendant. An application of the first class, cannot be made by a lienor, not a defendant, for the reason that, as he cannot move, without showing that he is a lienor, which can only be done by affidavit, he cannot found a motion solely upon the papers upon which the warrant was granted. As, then, a lienor can only move upon proof by affidavit on his own part, his application must necessarily be in the second class, and it may be opposed by new proof, by affidavit, on the part of the plaintiff, limited, however, to such proof as tends to sustain the ground, for the attachment, recited in the warrant, except in the case specified in the last clause of the section. For this purpose, a lienor must necessarily be regarded as included in the term "defendant" as used in the first clause of the second sentence of section 683, and that was probably the intention of the legislature. Otherwise, the right of a lienor to move, given by the preceding section, is cut off.

Under the former Code, it was held that since the issuing of a warrant of attachment was no longer the commencement of a legal proceeding, but was merely a provisional remedy in an action, the sufficiency of the affidavits was not a jurisdictional question, but a mere question of regularity in issuing process in the progress of an action (*Morgan agt. Avery*, 7 Barb., 656) which none but a party to the action, injuriously affected by it could take advantage of (*In the Matter of Griswold*, 13; *id.*, 412; *Isham agt. Ketchum*, 46, *id.*, 43, *per* SUTHERLAND, J.). Under the old Code, however, a subsequent attaching or levying creditor, could move to vacate an attachment on the ground of fraudulent collusion between the plaintiff and defendant. It is hardly reasonable to suppose that the new Code was intended to cut off that right, and at the same time to give to a lienor the right, previously denied to him, of moving to set aside an attachment for irregularity in an action

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to which he is not a party. And yet, the construction contended for by the appellant's counsel would work that result. We think the new Code is to permit a lienor to move to vacate an attachment which stands in his way, on any ground formerly open to him, or upon affidavits controverting those upon which the attachment was issued, but not upon the ground of irregularity.

These views render it unnecessary to consider the other questions argued by counsel, and lead to an affirmance of the order.

Order affirmed, with ten dollars costs and disbursements.

MULLIN, P. J. and TALCOTT J., concurred.

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SUPREME COURT.

CARLON CHURCH agt. CHARLES VAN BUREN.

Action upon a judgment—power of court to grant leave nunc pro tunc.

Where an action is brought upon a judgment rendered in the supreme court between the same parties, without first obtaining leave to bring the action, the court has power to grant such leave *nunc pro tunc*.

Oswego Special Term, November, 1877.

MOTION for leave to sue upon a judgment rendered in this court between the same parties, *nunc pro tunc*, as of a day prior to the commencement of the action, and for an order allowing the plaintiff to amend his complaint so as to aver such leave. The affidavits of the plaintiff and his counsel showed an inadvertance, and excused the omission to get leave to sue, and that the statute of limitations had run upon the judgment at the time of making the motion, but had not when the suit was commenced. No affidavits were read in opposition.

R. H. Tyler, for motion.*S. N. Dada*, opposed.

HARDIN, *J.*—The object of section 71 of the Code of Procedure was to prevent multiplicity of suits and accumulation of costs. The statute was aimed at the evil practice and designed to cut it off and prevent it. By bringing this action

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this court obtained jurisdiction of the parties and the subject-matter of the action. It has been held that leave to sue may be granted, *nunc pro tunc*, and the cases must be followed (*Burrough agt. Smith and Hall, decided by ROOSEVELT, J., reported in Voorhies' Code, edition of 1855; Finch agt. Carpenter, 5 Abb., 225*). But the defendant must be saved all costs he has incurred in defending this action, prior to granting such leave to sue *nunc pro tunc*, as he was justified in making an objection that would have defeated the plaintiff's recovery. Such an order is granted provided the plaintiff pays the defendant's costs incurred; and on payment of such costs he may have an additional order allowing him leave to amend his complaint within twenty days from the time of the entry thereof, and the defendant may answer in twenty days after the service of the amended complaint

NOTE. — An appeal was taken from the order in this case to the general term in the fourth department, and the order was affirmed in June, 1878, on the opinion of HARDIN, J., at special term. Section 71 of the Code of Procedure not having been repealed is still in force, and hence the importance of the foregoing decision. [ED.]

Matter of Pickett.

SUPREME COURT.

IN THE MATTER OF EDWARD PICKETT.

Overseer of the poor—duty as to rendering account of moneys received—willful neglect a misdemeanor—Mittimus—in whose name should be issued.

The act of 1863 (*Laws of 1863, chapter 172*) making it the duty of an overseer of the poor, of a town, to render an account to the town officers of such town, of all moneys received and disbursed by him, prescribes "no punishment" for the "willful neglect" of the duty thereby enjoined. The "willful neglect" of such duty is therefore a misdemeanor and punishable as such (3 *R. S. [6th ed.], p. 983, sec. 101*).

The *mittimus* may be either in the name of the people or that of the justice awarding it, but the latter is the most usual.

The magistrate is authorized to commit by statute, and as he is clothed with power to do the act, and does do it, there can be no reason why he should be compelled to insert in the body of the commitment that he acts by the authority of the people.

Albany Oyer and Terminer, May, 1878.

Mr. 'Hitt, for Pickett.

Messrs. Parker and Hun, for People.

WESTBROOK, J.—Edward Pickett was, in default of bail, committed to the common jail of Albany county by John McDonough Esq., a police justice of the town of Watervliet in said county. The defendant had been arrested upon a complaint duly made to said magistrate which charged the said Pickett, who had been one of the overseers of the poor of said town of Watervliet, with having "willfully and corruptly, and with intent to violate and evade chapter 172 of

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the Laws of 1863," refused and neglected to render an account as overseer of the poor to the town officers of such town of all money received and disbursed by him by virtue of his office, as required in and by said act. The justice, upon an examination as prescribed by law, adjudged that the offense "had been committed, and that there is probable cause to believe the said Edward Pickett to be guilty thereof," and because he, "the said Edward Pickett," did not offer "sufficient bail for his appearance at the next court having cognizance of such offense to answer therefor," he was committed to jail as before mentioned.

The sheriff of Albany county returns the original warrant of commitment issued by and in the name of the police justice aforesaid as the ground of his detention. To this warrant two objections are made: First, that it is not issued in the name of the people; and, second, that the alleged offense charged in the commitment is not one in law.

The warrant is properly issued in the name of the magistrate. Barbour, in his treatise upon criminal law (*page* 569), says: "The *mittimus* may be either in the name of the people or that of the justice awarding it, but the latter is the most usual." For this assertion he cites a number of authorities. The proposition is also, in our judgment, very clear. The magistrate is authorized to commit by statute, and as he is clothed with power to do the act, and does do it, there can be no reason why he should be compelled to insert in the body of the commitment that he acts by the authority of the people, which is all that would be imported by the declaration were it made.

Neither is there force in the second objection. The Revised Statutes (3 *R. S.* [6th ed.], *p.* 983, *sec.* 101) declare: "When any duty is, or shall be enjoined by law upon any person holding any public trust or employment, any *willful* neglect to perform such duty, where no special provision shall have been made for the *punishment* of such delinquency, shall be a misdemeanor punishable as herein prescribed." Chapter

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172 of the Laws of 1863, under which the proceedings against the defendant were taken, prescribes: "no punishment" for the "willful neglect" of the duty thereby enjoined. Hence, it necessarily and clearly follows, that if the defendant has done what the warrant of commitment charges, he is guilty of a misdemeanor. It is unnecessary to discuss the question, whether or not the old provisions of the Revised Statutes (2 *R. S.* [6th ed.], p. 821, *secs.* 70, 71 and 72) which require overseers of the poor to keep books and to lay their books, together with a just and true account of all moneys received and disbursed by them in their official capacity, before the town board of audit, and prescribing a penalty for not doing so, would subject the party offending thereunder to an indictment also. Our opinion is that it would, but that question will not be discussed. The proceeding against Pickett was not under the Revised Statutes, but under the act of 1863. Confessedly such latter statute prescribes neither "penalty" nor "punishment" for its violation, and hence by the plain provision of the one hereinbefore quoted, the willful neglect of duty prescribed by the laws of 1863, is a misdemeanor.

For the various reasons given, the writ of *habeas corpus* is dismissed and the prisoner remanded to the custody of the sheriff.

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SUPREME COURT.

ELLEN L. THOMSON agt. JAMES THOMSON *et al.*

Will — Construction of statutes — Testamentary guardian — consent of mother — Trusts of real and personal estate — legal title — void devise.

Although, at common law, the father had the paramount right to the custody and control of his minor children, yet his power to make a *testamentary* disposition of their guardianship, is derived exclusively from the *statutes*.

The provisions contained in section 6 of the act of April 10, 1862, declaring that no man shall create any testamentary guardianship of his child, unless the mother, if living, shall, *in writing*, signify her assent thereto, is repealed by chapter 82, Laws of 1871, page 89.

The amendment of 1871 covering the subject-matter, was intended to dispense with the consent of the mother to a testamentary appointment by the father, and to reinstate the father in his unqualified right to appoint a testamentary guardian for his minor child, as it existed under the Revised Statutes of 1880, part 2, chapter 8, title 8, section 1.

When the provisions of two statutes are manifestly repugnant, the earlier enactment is impliedly modified or repealed (*In addition to the cases cited below, vide People ex rel. Ross agt. The City of Brooklyn*, 69 N. Y., 605; *People ex rel. Canj. Nat. Bank agt. Bd. Supra. Mont. Co.*, 67 N. Y., 109).

Where a testator devised to the executors, etc., of his will all his real estate in trust, to sell the same whenever they should deem a sale thereof expedient and proper; to collect the rents, issues and profits thereof; to repair and improve the same out of his personal estate, and the rents of his real estate, or the proceeds of the real estate sold, and generally to manage, control and dispose of the same as they shall see fit, and they were authorized in their discretion to lease or purchase, in their own name, residences to be used and occupied until the death of his wife:

Held, that the executors were vested with the legal title to the estate; that the intention to clothe them with the legal title is shown by the express words of gift, and the duties and responsibilities imposed.

When the testator declared that all the rest, residue and remainder of his estate, after the payment of debts and legacies, should be equally divided among his wife and children, as is thereafter in the will provided, and

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afterwards in the will directed that one-quarter of the proceeds of such sale of his real estate should be paid over to his wife, and the remaining three-quarters to be equally divided among his children, share and share alike, the executors were directed to invest the three-quarters upon bond and mortgage, and to pay over the income and profits to the guardians of his children for their support and maintenance.

Held, that it was the intention of the testator that the power of sale should be exercised within the lifetime of his widow, and that the trust as to her share would terminate at her death.

That, until a sale of the real estate, the widow should receive her proportion of the rents and profits from the trustees, and that the children's portion should be paid to the guardians; the same persons being constituted trustees and guardians under the will.

Also, *held*, that the trust in the executors, which was not to continue beyond the life of the beneficiary, was valid.

When there are no words of gift except as involved in the words "equally divided among," these words sufficiently dispose of the interest intended to be disposed of (*Clancy agt. O'Gara*, 4 Abb. N. C., 268, 271).

Where a testator gave to his three minor children certain portions of his estate, to be paid to them when they should severally attain the age of twenty-one years, and provided that in case of the death of either child before arriving at the age of twenty-one years, without issue, the share to which the child so dying shall be entitled, shall go to the survivors or survivor of the children and the issue of a deceased child, and afterwards in the will gave to his brothers and sisters the shares of his children, in the event that they should all die without issue, before arriving at the age of twenty-one:

Held, that, as the consummation of the gifts to the brothers and sisters of the testator depended upon the termination of more than two lives in being at the death of the testator, they are illegal and void; but that the provisions in favor of the brothers and sisters could be dropped, without disturbing the valid disposition of the will.

Special Term, New York, February, 1876.

ACTION for a construction of the will of William Thomson, deceased, and to annul the appointment of testamentary guardians, made by the testator for his minor children. The portions of the will concerning which questions for construction arose were as follows:

Seventh. All the rest, remainder and residue of my estate, (after payment of my debts and said legacies) whether real

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or personal and the proceeds, income, rents, issues and profits thereof, shall be equally divided among my wife, Ellen L. Thomson, and my three children share and shares alike, as is hereinafter provided.

Eighth. I appoint my wife, Ellen L. Thomson, and my brothers James Thomson and David Thomson the survivor or survivors of them, the testamentary guardians of my children respectively, with full powers to direct their education nurture and maintenance, and to receive, invest and expend the income, avails and proceeds of the respective shares of my said children, in and to my estate, as may be in their judgment expedient. As my wife will probably be charged with the principal expenditure and care of the funds to be paid out for the maintenance, support and education of my children, during their minority, it is my will that my brothers James or David shall not in any event be held responsible for the manner or details of such expenditure, and that the indorsement of my said wife upon any cheques drawn by the said testamentary guardians for the purpose aforesaid, or her receipt for any moneys delivered to her for that purpose, shall be a full and conclusive indemnity to the others of said guardians, against all accountability or responsibility whatever, by reason of such payment or the method of its appropriation.

Ninth. I give and devise to the executors and executrix of this my will, all my real estate, wheresoever situate, in trust, to sell the same, whenever they shall deem a sale thereof expedient and proper, and to execute good and sufficient deeds to purchasers upon any sale thereof, or of parts thereof, to collect and receive the rents, issues and profits thereof, to repair and improve the same, out of my personal estate, and the rents of my real estate, or the proceeds of my real estate sold, and generally to manage, control and dispose of the same, as they shall see fit. I direct that during the life of my wife the Madison avenue house, and the house and land at Lenox, Massachusetts, and the furniture therein, respectively, shall be reserved and appropriated for a residence for my wife and

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our children, so long as she and they shall remain unmarried, and my executors are hereby authorized and empowered to lease, or in their discretion to purchase, in their name, other, residences in the city of New York, or elsewhere, to be used and occupied until the death of my said wife, and also during such period to renew and replace, as may be suitable, the furniture in such house, and to pay all taxes and assessments at the expense of my general estate.

Tenth. In case of any sale of any of my real estate, I direct one-quarter of the proceeds of such sale to be paid over to my wife, Ellen L. Thomson, and the remaining three-quarters to be equally divided among my children share and share alike. And I direct my executors to invest the last three-quarters of such proceeds upon bond and mortgage (each one-quarter separately) as they shall deem advantageous, and pay over the income and profits thereof, to the guardians of my said children, to be by them appropriated or invested, as far as necessary, for the maintenance, support and education of my said children respectively. The remainder and residue of my personal estate, after payment of my debts, and the legacies above provided for, shall be equally divided into four parts, one-fourth part of which shall be paid to my wife within two years after my death, and the remaining three-fourths shall be separately invested for the benefit of my respective children, upon bond and mortgage, on unincumbered real estate in the counties of New York, Kings and Queens, in the state of New York, and the income thereof shall be paid to the guardians of my children as above provided.

Eleventh. When my children shall respectively attain the age of twenty-one years, the share to which each one of them is entitled under the provisions of my will, with all accumulations thereof, shall be paid over to the child so attaining the age of twenty-one years. In case any other child or children shall be born to me after this my will, I direct that all my property, real and personal shall be equally divided, by a division equaling the whole number of my wife and children,

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(and their issue *per stirpes* if any shall be dead); and each of my said children (and their issue *per stirpes* in case of the death of any of them) and my wife shall receive the equal quantity thereof, respectively, in the same manner, and to the same effect as is hereinbefore provided as to the quarter shares herein bequeathed to my wife and existing children respectively.

Thirteenth. In case of the death of either of my children before arriving at the age of twenty-one years without issue, the share to which the child so dying shall be entitled under this my will, shall go to the survivors or survivor of my said children, and the issue of such as shall be dead, *per stirpes*, in equal shares.

Fourteenth. If either of my children shall die before the time of my death, leaving issue, then the share herein given to said child shall go to his issue *per stirpes*.

Fifteenth. If all my children shall die before arriving at the age of twenty-one years, without issue, then the shares of my said estate, to which my said children shall be entitled under this my will, shall go to my brothers and sisters, and the survivors and survivor of them, and to the issue of such of them as shall be dead, *per stirpes*, share and share alike.

Tracy, Olmsted & Tracy and Theodore W. Dwight, for plaintiffs.

Aaron J. Vanderpoel, for defendants.

VAN VORST, J. — William Thomson, the testator, whose will is under consideration, died on the 13th day of January, 1872, leaving him surviving the plaintiff, his widow, and three children, sons, all infants under the age of twenty-one years. By the second clause of his will, bearing date December 14, 1871, the testator appointed his wife and his brothers, James and David, executors and executrix thereof, and by the eighth clause appointed the same persons the survivors

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and survivor of them, the testamentary guardians of his three infant children.

Subsequent to the death of the testator, the wife and brothers have acted as such guardians.

The appointment, by the testator, of testamentary guardians for his children, is now claimed by the plaintiff to be void, upon the ground that she had not, *in writing*, during her husband's life, signified her assent thereto.

As the power of the father to dispose of the custody and tuition of his children, during their minority, is derived from the statutes, the validity of the appointment, made by him, depends upon its conformity to the provisions of the statutes.

Although, by the common law, the father has the paramount right to the custody and control of his minor children, yet it is generally believed that he could not make a testamentary disposition of their guardianship.

This power is derived exclusively from the statute.

The Revised Statutes of 1830 (*part 2, ch. 8, title 3, sec. 1*) provides as follows:

"Every father, whether of full age or a minor, of a child likely to be born, or of any living child, under the age of twenty-one years and unmarried, may, by his deed or last will, duly executed, dispose of the custody and tuition of such child, during its minority or for any less time, to any person or persons in possession or remainder."

This section was a substantial re-enactment of the provisions on this subject of the Revised Laws of 1813 (*p. 368*), and which were derived from the statute of 12 Ch., 2 (*chapter 24, secs. 8, 9, 10, 11*).

March 20, 1860, an act was passed by the legislature, entitled "an act concerning the rights and liabilities of husband and wife."

Section 9, of that act, provides "that every married woman is hereby constituted and declared to be the joint guardian of her children, with the husband, with equal powers, rights and

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duties in regard to them with her husband" (*Session Laws of 1860, chap. 90, p. 159*).

By the act of April 10, 1862, the foregoing section, contained in the act of 1860, was repealed, but by section 6 it was provided that "no man shall bind his child to apprenticeship, or part with the control of such child, or create any *testamentary guardian thereof*, unless the mother, if living, shall, in writing, signify her assent thereto" (*Laws of 1862, chap. 172, p. 343*).

On the 10th February, 1871, before the death of the testator, an act was passed, entitled "an act to amend the first section of the third title of the eighth chapter of the second part of the Revised Statutes, in relation to the custody of minor children." It is in these words:

"Section 1. Every father, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may, by deed or last will duly executed, or in case such father shall be deceased and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, of every such child, may, by her deed or last will duly executed, dispose of the custody and tuition of such child during its minority, or for any less time to any person or persons in possession or remainder" (*Laws of 1871, chap. 32, p. 39*).

An examination of the text, shews that the amendment of February 10, 1871, is, in effect, a re-enactment of the provisions of the statute of 1830, first above set forth, conferring, however, upon the mother, the right of appointment by last will and testament, in the event that the father shall have died without exercising it.

The validity of the appointment made by the testator under consideration, depends, in the first place, upon the question as to whether or not section 6 of the act of 1862 has been repealed or is still in force.

Repeals by implication are not favored. But when the

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provisions of a later statute are opposed to those of an earlier, the earlier statute is considered as repealed.

Where the provisions of two statutes are manifestly repugnant, the earlier enactment will be impliedly modified or repealed (*Broom's Legal Maxims*, page 29 and cases cited).

I think such repugnance exists between the two enactments in question.

The amendment of 1871 was intended to dispense with the consent of the mother, to an appointment by the father, and to reinstate the father in his unqualified right to appoint a testamentary guardian for his minor child, or children.

The legislative expression is clear and distinct. It declares that the father may in this manner dispose of the custody and tuition of his minor child. There is no condition imposed, that the validity of his appointment shall depend upon the consent in writing of the mother.

If the right to make such appointments, after the passage of the amendment was to be dependent upon the consent in writing of the mother, it is but reasonable to conclude, that the legislature, having the principal statute in relation to the custody of minor children under consideration, would have then, by proper words, saved the provisions of section 6 of the act of 1862.

I am of opinion that the latter statute covers the subject-matter, and was intended as a substitute for all former provisions on the subject (*Mongeon agt. People of the State of New York*, 55 N. Y. R., 615; *The Dexter and Limerick Plank Road Co. agt. Allen*, 16 Barb., 15).

The repugnancy to which allusion has been made, consists in this, that the amendment of 1871 gives the absolute right of appointment to the father, by his last will and testament, and that, too, after previous legislation qualifying the right. The qualification, making the father's right dependent upon the consent of the mother, to creating a guardianship, is clearly repugnant to the unqualified right conferred by the later enactment, and is, by a necessary implication, repealed.

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Such seems to be the conclusion reached by the learned reviser of Willard's treatise on equity jurisprudence, 1875.

After referring to the various laws upon the subject, and above referred to, he says: "In 1871, by the act chapter 32, section 1, the Revised Statutes were so amended, as to give to every father the right to dispose of, by will, duly executed, the custody and tuition of his minor child, and adds, "That it would seem that the Revised Statutes of 1830, except so far as modified or changed by the act of 1871, are in force" (*Willard's Equity Jurisprudence, revised by Platt Potter* [1875] pages 620, 621).*

I do not find that the effect of the amendment of 1871 has been elsewhere considered.

I do not regard the cases of *Ely agt. Holten* (15 N. Y., 595) and *Moore agt. Mausert* (49 N. Y., 332), to which I am referred by the learned counsel for the plaintiff as in conflict with the above conclusion.

The amendment of 1871, is a formal enactment with an important addition, of a section of the Revised Statutes, which, if it had not been in effect repealed by the act of 1860, had been greatly changed and modified thereby, and which later law itself, in 1832, gave place to a new and independent provision, which qualified the original enactment, and it thus became necessary, to reach the end in view, to restore the original section, with the addition referred to.

If nothing more was intended than to confer the right upon the mother to appoint a guardian, in case the father had omitted to do so, that result would have been readily reached by adding simply a new section giving such right.

The form of the amendment adopted, under the condition of the law at the time, would seem to indicate that the legislature intended to cover the whole subject.

Ely agt. Holten (*supra*) decides that by incorporating a new provision, by way of amendment, in the body of an existing statute, the amendment declaring that the section be amended

* See note at end of case, page 511.

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"so as to read as follows," and the section is then copied with the changes to be made, no new right is conferred, so far as the new matter is concerned, anterior to the date of the amendment.

The case was disposed of on that ground.

And *Moore agt. Mausert (supra)* approving *Ely agt. Holten*, holds that the filing of a mechanic's lien in the office of the town clerk, under a statute, which had been amended, in pursuance of a statute declaring that such statute should be "amended so as to read as follows," retaining a part of the former statute but which abrogated the provision requiring that the notice should be filed in the town clerk's office, and had substituted in the place thereof the county clerk's office, was ineffectual to create a lien. What is said in those cases respecting existing statutes, repeated by way of amendment, that they "have been the law all along," do not apply to a statute which had been previously amended.

The statute of 1862 was at best incomplete.

It did not, in terms, state when the written consent of the mother should be given, nor with what formality executed, to whom to be delivered, nor how or in what manner it was to be preserved, nor does it guard against the effect of a revocation of such consent after given. It is readily seen that in its then form it was likely to introduce an element of uncertainty and perhaps of disagreement, and to some extent cripple the testamentary power of the father.

It may be that considerations of this character influenced the legislature in its restoration to the father of an unqualified right to make a testamentary disposition of the custody and tuition of the minor children.

I must hold, therefore, that the appointment of the persons named as testamentary guardians in the will under consideration is valid.

This conclusion dispenses with the necessity of examining the question as to whether the drawing of checks by the plaintiff, in the years 1872, 1874 and 1875, as executrix, pay-

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able to the order of herself and James and David Thomson, "*testamentary guardians* of the children, and the indorsement of the same by herself and them as such testamentary guardians upon which funds were drawn, and the signing by her of receipts for moneys received from the persons named, being, as therein expressed, "the testamentary guardians named in the will of William Thomson," to be applied to the maintenance, support and education of the children, amount to a consent in writing to their appointment as such. It being held that such consent is not necessary to the validity of the appointment.

By the ninth clause of his will, the testator devised to the executors and executrix thereof, all his real estate, in trust, to sell the same, whenever they should deem a sale thereof expedient and proper, and to execute good and sufficient deeds to purchasers; to collect and receive the rents, issues and profits thereof, to repair and improve the same, out of his personal estate, and the rents of his real estate, or the proceeds of his real estate sold, and, generally, to manage, control, and dispose of the same as they should see fit.

The Madison avenue house, and the dwelling at Lenox, and the furniture thereof were, however, reserved, and appropriated by the testator, as residences for his wife and children, so long as they should remain unmarried.

But the executors were authorized and empowered to lease, or in their discretion to purchase, in their name, other residences in the city of New York, or elsewhere, to be used and occupied until the death of his wife, to renew and replace the furniture, and pay all the taxes and assessments out of his general estate.

By the tenth clause of his will the testator directed that one-quarter of the proceeds of such sale of his real estate, should be paid over to his wife, Ellen L. Thomson, and the remaining three-quarters, to be equally divided among his children, share and share alike; he, however, directed his executors to invest the three-quarters of the proceeds upon bond

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and mortgage, each one-quarter separately, as they should deem advantageous, and pay over the income and profits thereof, to the guardians of his children, to be by them appropriated or invested, as far as necessary, for the maintenance, support and education of his children respectively. The personal estate of the testator, after the payment of debts and legacies thereout, was, by the will, divided into four parts, one-fourth part of which was to be paid to the testator's wife, within two years after his death, and the remaining three-fourths was to be separately invested, for the benefit of the children respectively, upon bond and mortgage, and the income to be paid to the guardians of the children as provided with respect to the income of the real estate.

It is urged by the learned counsel for the plaintiff, that the eighth and ninth sections of the will, do not, of themselves, or taken in connection with each other, or with other provisions of the will, create a trust in the executors, but at the most constitute a power only, and that accordingly the title to the real estate rests in the heirs, and they further claim, that there is no valid trust of the personal estate.

With respect to the real estate, as appears from the above provisions of the will, the same was in terms devised to the executors and executrix in trust. But a general devise to executors in trust, vests no estate in them except for such of the declared purposes as require that the title be vested in them (*Manice agt. Manice*, 43 N. Y., 303).

Although the power of sale, with which the executors are invested, is a trust, yet the executors are not invested in virtue thereof alone with the legal title. This power could be well executed, under the will, without the legal estate being in them.

But the devise is upon the further trust to collect and receive the rents, issues and profits thereof, to repair and improve the same out of the rents or proceeds of real estate sold.

To lease, or in their discretion purchase, in their own name,

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residences for the family in New York or elsewhere, and generally "to manage, control and dispose of same as they shall deem best," to accomplish the purposes of the will.

Convenience would seem to require that for the discharge of their duties and trusts, the executors and executrix should be clothed with the legal title and this has been expressly given.

The trust to sell is one of those authorized by the Revised Statutes, but if unaccompanied by the right to receive the rents and profits, it is valid as a power, but vests no estate in the trustees.

But the trustees must take an estate adequate to the due execution of the trust.

It is necessary that the executors should have the legal estate to enable them to collect the rents in their own name (*Wood agt. Wood*, 5 *Paige*, 597; *Bradley agt. Amidon*, 10 *id.*, 235; *Leggett agt. Perkins*, 2 *Coms.*, 297; *Tobias agt. Ketchum*, 32 *N. Y.*, 319).

But it is urged, as a further objection, that the duties of the executors under the will, are not active. That there is no positive direction to them to apply the rents, income and profits of the estate in any particular manner, nor to the use of any person, as is required with respect to express trusts authorized by statute.

By the seventh clause of the will, the testator declares that all the rest, residue and remainder of his estate, after payment of his debts and the legacies provided for, shall be equally divided among his wife and children, share and share alike, as is "thereafter in the will provided."

This direction manifestly applies to the way in which the same should be paid and applied. The testator contemplated an execution by his executors of the power of sale of his real estate, with which he had invested them.

Hence, in the tenth clause of his will, he directs his executors to invest the three-quarters of the proceeds of all sales, designed for his children, upon bond and mortgage, and the

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payment of the income of each one-fourth to the guardians of his children, to be by them appropriated to their support, education and maintenance.

I must conclude that the testator intended that the children's portions of the rents and profits of the real estate, which the executors were authorized to collect by the ninth clause, before a sale thereof, should be paid by them to the guardians of the children, and that such intention is expressed by the words "as is hereinafter provided" at the close of the seventh clause. Such trust is within the statute (1 *R. S.*, 728, *sec. 5, subd. 3*; *Gott agt. Cook*, 7 *Paige*, 521; *DeRay agt. Irving*, 5 *Den.*, 646).

A payment to the guardians of the children, who have, under the will, the direction of their education, nurture and maintenance, is an application of the income to their use.

The duties of the trustees are active, they would be clearly so if the payment was directed to be made to guardians other than themselves. But the fact that the same persons are both trustees and guardians, cannot make what is active in the one case, absolutely inactive in the other. There is a distinct act enjoined, and which must be actually performed. This action involves the transferring and passing from themselves, standing in one relation, and subject to certain duties and liabilities, of funds to themselves occupying a new relation, and subject to new duties and responsibilities, with respect to the testator's children of whom they are the guardians. But the testator contemplated that his wife would be charged with the principal expenditure and care of the funds, to be paid out for the maintenance, support and education of his children during their respective minorities, and hence he provides, in the eighth clause of the will, that payment to her for this purpose, evidenced by proper vouchers, would be a full indemnity to her co-guardians. The terms "invest" and "invested" when used by the testator in regard to the disposition of the income by the guardians, have no significance which can be truly urged as illegal, and do not stand opposed

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to the application of the whole thereof, to the chief purpose the testator had in mind, which was the support of his children during their respective minorities, out of their several shares of the income, and the safe custody of the principal, to be paid to them when they should severally attain the age of twenty-one years.

If more income was received from any share than was necessary for the support of the child for whom it was designed, the surplus would be held for the benefit of such child, and would be paid over at the time designated for receiving the principal.

The trust with regard to the personal estate and the income thereof, is of the same character as those relating to the real estate.

I see no valid objection, in these regards, to the dispositions made by the testator in respect either to the real or personal estate, or to the trusts created in the executors with respect to the same.

The trusts over the children's shares continue by virtue of the eleventh clause of the will, until they respectively attain the age of twenty-one years, when the share to which each child is entitled, with all accumulations, shall be paid over to each child.

The widow's share of the rents and profits of the real estate should be paid to her directly by the executors and trustees until a sale thereof, when she is entitled absolutely to one-fourth of the proceeds of the sale, and she is entitled to receive one-fourth part of the personal estate, within two years from her husband's death.

The gift, in the fifteenth clause of the will, to the brothers and sisters of the testator of the shares of his children out of his estate, in the event that they should all die without issue, before arriving at the age of twenty-one, contravenes the statutes of perpetuities.

The thirteenth clause of the will provides, that in case of the death of either child before arriving at the age of twenty-

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one years, without issue, the share to which the child, so dying, shall be entitled under the will, shall go to the survivors or survivor of the children, and the issue of such child as shall be dead.

The consummation of the testator's gifts to his brothers and sisters, depends upon the termination of more than two lives in being at the death of the testator, and is illegal.

The provisions in favor of the brothers and sisters of the testator can, however, be dropped without disturbing the other dispositions of the will which are held to be valid.

The provisions of the eleventh and thirteenth sections of the will remain intact, and the property must remain subject to the trusts as to the shares of each child until his majority (*Oxley agt. Lane*, 35 *N. Y.*, 340; *Savage agt. Burnham*, 17 *id.*, 561; *Kane agt. Gott*, *supra*).

The conclusion reached is, that all the provisions of the will are valid except the portion of the fifteenth clause above referred to, which is void.

Findings and conclusions will be prepared by the plaintiff's attorney on the basis of this decision, and will be settled upon notice to the defendants.

After the findings had been settled, in pursuance of the foregoing opinion, a motion for a resettlement was made; the question raised was in respect to the extent and quality of the trust created by the will.

Upon this motion the following opinion was delivered :

Special Term, September, 1877

VAN VORST J. — The ninth clause of the testator's will, is the only part thereof, in which the real estate, of which he died seized, is disposed of by distinct words of gift and devise.

In that clause the real estate, is explicitly, by apt words, given and devised to the executors, and executrix.

Thomson agt. Thomson *et al.*

The duties imposed upon them by the will, with respect to the rents and profits thereof, the management, sale, and disposal of the realty itself, as was stated in the opinion heretofore delivered in this action, invested the executors and executrix with the legal title.

The intention of the testator to clothe them with the title, is shewn by the express words of gift to them, and by the duties and responsibilities imposed by him. He meant that the property should be sold through and by them only.

Although there is no positive limitation imposed by explicit words, as to the time within which the trust to sell should be exercised, it was the manifest intention of the testator that the property should be sold within the lifetime of the widow, and that as to her interest in the estate, the trust should terminate at her death.

In and by the tenth clause of the will one-quarter of the proceeds of any sale, was to be paid over to his wife.

There is evidence of the testator's intention contained in the will, that the real estate should be actually sold and converted into money, by his executors and executrix, except the Madison avenue and Lenox property, and that the gift to her was not of the substance of the realty, but one-quarter of the proceeds realized upon its sale.

The seventh clause in this regard is in subordination to the subsequent ones, but is not in conflict with them.

It will be observed that in the seventh clause there are no words of gift except as involved in the expression "*equally divided among.*" These words, while in themselves sufficient to dispose of the interest intended, are modified in substance, as is the whole clause, by the closing words, "*as is hereinafter provided.*"

These words clearly refer to the clauses of the will directing the sale of the realty and the payment to the wife of her portion of the proceeds, and of the investment of the children's shares.

The rents and profits are expressly given to the executors

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and executrix, and the widow, until sale, must receive her portion thereof, under the seventh clause, from them.

The trust in the executors and executrix of the real property, is not as to the interest of the widow, and the rents, issues and profits thereof, in contravention of the Revised Statutes (*Revised Statutes*, vol. 2, p. 728, sec. 55, sub. 3).

The will, by its terms, does not continue the trust beyond the life of the widow. And in saying that the trust does not continue beyond her life, nothing is conveyed in opposition to the terms of the will.

Nor is the will opposed to the case of *Downing agt. Marshall* (23 N. Y., 366).

In that case the continuance of the trust was not dependent upon the *life of the beneficiary*, but of *another* not interested in its performance.

I think the findings heretofore made, together with the conclusions, must stand as signed. The plaintiff's counsel, who prepared them, asks for a resettlement on the supposed ground that he was in error in so framing them, that the opinion heretofore delivered does not support them.

If there is any obscurity in the opinion on that subject, it is removed by what is above stated.

The motion is denied, without costs.

NOTE. — The Hon. Platt Potter, in reviewing the proposition on the subject of the guardianship of minor children, contained in his edition of Willard's Equity Jurisprudence (pages 620, 621), writes what, with his permission, is added as a note, as follows:

"By the Revised Statutes of 1830 (vol 2, p. 150, sec. 1) it was provided that every father, &c., may, by his deed or last will, &c., dispose of the custody, &c., of his child, &c. This was the only statute regulation then in force, and this so remained until 1860 (*Sess. Laws, chap. 90, p. 159, sec. 9*).

"This last statute took away the power of appointment, and itself, in terms, made the appointment of wife and husband as joint guardians. Before, the power of appointment was in the father. Then came the act of 1862 (*chap. 172*), which first, in absolute terms, repealed the provision (*sec. 9 in the act of 1860*). It did not amend that act, but enacted a new provision: Repealing the act of 1860, revived the Revised Statutes,

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and section 6 of the act of 1862 was, therefore, an amendment of the Revised Statutes, in that there was a prohibition to the man, which, doubtless (as it is afterwards in the same section connected with the mother), is to be construed to mean the father, or such other man as may be authorized to bind, as in case of apprentices. Then came the act of 1871, which purports to be an amendment of the Revised Statutes (and which it assumes to be in force). This amendment consists in giving to the mother (when the father had died without executing his power of appointment) the same power, as the father might have exercised, while living. This was not in the Revised Statutes.

"Then the question arises whether section 6 of the act of 1862 is repealed; what I wrote in the book will have that inference, and I am willing now, upon review, to repeat, that so far as the guardianship of minor children is concerned, it is a repeal by necessary implication.

"The act of 1862 prohibits the disposition, except upon the condition of the mother's written consent. The act of 1871 authorizes it to be done without condition attached.

"The Revised Statute in 1871 is made to read as follows, &c., &c.

"That is, it is made to read as to the particular matter under consideration as to destroy the condition of the act of 1862.

"This repugnance is confined, however, to guardianship. It must be remembered that section 6 of the act of 1862 extends to apprentices and the power to bind them, as well as the appointment of guardians. By like rule of construction, so much of section 6 as relates to the binding of apprentices, is not repealed by the act of 1871, nor by any other act so far as I have examined. That is, there is not a total repeal of that section." [R.E.P.]

Matter of Van Buren.

SUPREME COURT.

IN THE MATTER OF THE PETITION OF JAMES VAN BUREN.

Assessments for constructing drains vacated — filling up sunken lots not contemplated by act of 1871, Laws of 1871, chapter 566.

An assessment will be vacated where in point of fact it is not levied for works which can be said to have been performed under the act.

The act of 1871 (*Laws of 1871, chapter 566*) contemplated and provided for an assessment for expenses incurred in constructing drains. Where, as in this case, the great bulk of the assessment was for work done in filling up sunken lots:

Held, that it was a "substantial error," within the act of 1874 (*Laws of 1874, chapter 812*), and that the assessment should be vacated and set aside.

The corporation cannot, under the garb of exercising the authority conferred by a certain act, exercise another and a totally different power, conferred by other and different legislative acts, and involving another and different procedure.

Special Term, August, 1878.

C. E. Miller, for petitioner.

J. A. Beall, for the mayor, etc., of New York.

LAWRENCE, *J.* — I am of the opinion that the assessment in this case should be vacated and set aside.

First. It may well be doubted under the decisions of the court of appeals in the case of *The People agt. Haines* (49 *N. Y.*, p. 587), and in *The Matter of Rhinelanders* (*MS. opinion*), whether, as the drains contemplated to be constructed under the act of 1871 (*chapter 566*) are to run through

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private property, and the public are thereby to acquire an easement in said lands, the owners thereof are not entitled, under article 1, section 6 of the Constitution, to compensation, for such an interference with their proprietary interests.

In the view which I take of this case, it is not, however, necessary to pass upon this point.

Second. The assessment should be vacated, because, in point of fact, it is not levied for works which can be said to have been performed under the act of 1871. That act contemplated an assessment for expenses incurred in constructing drains. In this case it will be seen that the great bulk of the assessment is for work done in filling up the lots embraced in the area bounded by Ninety-second and One Hundred and Sixth streets and First and Third avenues.

Between One Hundredth and One Hundred and Fourth streets and the First and Second avenues there are no drains, but there is a vast amount of filling.

Between Ninety-sixth and One Hundredth streets and the First and Second avenues no work appears to have been performed either in constructing drains or in filling. The same may be said of the area lying between the Second and Third avenues and One Hundred and Second and One Hundred and Sixth streets.

Between One Hundred and Second and Ninety-fourth streets and the Second and Third avenues drains were constructed, but the filling constitutes the principal portion of the work.

Between Ninety-second and Ninety-third streets and Second and Third avenues no work has been executed.

Between Ninety-second street and Ninety-fifth street and the First and Second avenues the work includes both drains and filling. The assessment is laid for the entire work, and it is only necessary to look at the statement of the work charged for to see that the draining of the lots was not the main work, and that it constituted an insignificant and almost an infinitesimal portion of the expense, which it is now proposed to

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impose upon the property owners. It appears from the assessment list that there were 3,328 lineal feet of drains at one dollar and sixty-five cents, making a total of \$5,491.20, while there were 431,619 cubic yards of earth filling at sixty-five cents per yard, making a total of \$280,552.35, which is more than fifty-one times the amount expended for the construction of the drains. If this is not a "*substantial error*," it is difficult to see what can be comprehended under those words (*Laws of 1874, chap. 312*).

Third. I do not mean to be understood as denying that the corporation has the power to direct the filling up of sunken lots, where the municipal authorities have proceeded in the manner pointed out by the laws relating to that subject. But the filling of sunken lots is not the construction of drains under the act of 1871, and the corporation cannot, under the garb of exercising the authority conferred by that act, exercise another and a totally different power, conferred by other and different legislative acts, and involving another and different procedure (*See Revised Laws, 1813*).

Fourth. There are many errors relied upon by the counsel for the petitioner in this case as vitiating the assessment, but it is unnecessary to notice them, inasmuch as the error already alluded to is so glaring, and, in the language of the act of 1874, "*substantial*," that no further argument appears to be needed to show that justice demands that the assessment should be set aside. Let an order be entered vacating the assessment.

Rassbeck *et al.* agt. Desterreicher *et al.*

N. Y. COMMON PLEAS.

THOMAS A. RASSBECK *et al.* agt. IGNATZ DESTERREICHER *et al.*

Corporations for manufacturing purposes—Certificate, when and where to be filed—effect of not filing duplicate in office of secretary of state.

The provisions of the statutes in relation to the formation of corporations (*Laws of 1848, chap 40; Laws of 1866, chap. 709*) requiring the "duplicate certificate" to be filed in the office of the secretary of state is directory, merely, and not mandatory nor essential to the validity of the corporation.

The certificate having been filed in the office of the clerk, it is immaterial in any action (not brought by the state against the corporation to prohibit its exercise of corporate powers) to inquire whether the duplicate of such certificate has been filed in the office of the secretary of state.

The production of a copy of the certificate filed with the county clerk, which copy is testified by him, being made evidence of the incorporation by the statute, is sufficient proof of corporate existence and sufficient answer to all allegations of non-incorporation, except in a direct proceeding by the state to annul the franchise.

Special Term, August, 1878.

MOTION for a preliminary injunction and the appointment of a receiver.

Albert Roberts, for plaintiff.

Simon Sultan, for defendant.

J. F. DALY, *J.*—The plaintiffs and the defendants entered into an agreement under seal, dated July 7, 1877, by which

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they agreed to form a corporation to be called "The Photo Plate Company," for the purpose of making relief plates for printing and for other purposes. Pursuant to such agreement, they subscribed and acknowledged a certificate as provided in the first section of the act to authorize the formation of corporations for manufacturing and other purposes, passed February 17, 1848, and the acts amendatory thereof. The certificate was dated July 7, 1877, and acknowledged on that day. It was filed in the office of the clerk of the city and county of New York, the proper county, pursuant to the act, on September 22, 1877. No duplicate of the certificate was filed in the office of the secretary of state as required by the act (*Chap. 40, Laws of 1848; chap. 709, Laws of 1866*).

The parties treated the corporation as regularly organized and proceeded with its business pursuant to the certificate of incorporation from the date of the filing of the certificate up to the time of the commencement of this action, when the plaintiffs, conceiving that the neglect to file a duplicate of their certificate in the office of the secretary of state resulted in a failure to effect a valid incorporation under their agreement, and having reason to complain, as they believed, of the acts of defendants, brought this action to obtain the appointment of a receiver of the joint property and to wind up the business. A preliminary injunction was obtained, which plaintiffs moved to have made permanent. The plaintiffs argue that by reason of the failure to file the duplicate of the certificate of incorporation in the office of the secretary of state, the parties subscribing the certificate became merely copartners *inter sese*. Upon the correctness of the proposition depends the right to the relief asked upon this motion. What consequences result from the failure to file the duplicate of the certificate of incorporation as required by the act has not been the subject of judicial examination in this state. The statute requires "that the certificate shall be filed in the office of the clerk of the county in which the business of the company shall be carried on," and "a duplicate thereof in the office of the

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secretary of state" (*Sec. 1*). It is further provided that "when the certificate shall have been filed as aforesaid, the persons who shall have signed and acknowledged the same and their successors shall be a body politic and corporate," &c. (*Sec. 2*). The section does not in terms make the filing of the "duplicate" essential to the incorporation, and the court will incline to an interpretation of the statute which will give validity to the acts and proceedings of the parties done and taken in good faith as a corporation.

The general manufacturing corporations act of California contains provisions as to the mode of incorporation almost identical with our statute (*act of 1850, 365, 366*). It was held by the supreme court of California that the natural and ordinary import of the language used in that statute does not justify the construction that proof of the filing of the "duplicate" in the office of the secretary of state is necessary to establish the existence of the corporation; that the intention of the statute clearly was, that so far as individuals are concerned, the corporation should acquire a valid legal existence upon the filing of the certificate in the office of the clerk of the county; that the rights conferred by the statute vest on filing the certificate and can be divested only by a direct proceeding on the part of the state (*Mokolumne Hill Mining Co. agt. Woobury, 14 Cal., 424*).

The general manufacturing corporations act of Illinois also contains provisions as to the mode of incorporation similar to those of our statute (*act of 1849, pp. 87, 88*). The supreme court declared the provision requiring the "duplicate" to be filed in the office of the secretary of state directory, merely, and not mandatory nor essential to the validity of the corporation; that it was apparent from the act to have been a secondary object and intended to multiply proof, places of publicity and the chances of preservation of the evidence of incorporation, and that the filing of the certificate in the office of the county clerk was sufficient to effect the incorporation (*Cross agt. Pinckneyville Mill Co., 17 Ill., 54*).

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This view of the statute is in effect taken in many subsequent cases in that state (*Tarbell* agt. *Page*, 24 Ill., 48; *Stone* agt. *Great Western Oil Co.*, 41 Ill., 85; *Thompson* agt. *Candor*, 60 Ill., 248; *Willard* agt. *Trustees, &c.*, 66 Ill., 55).

The reasoning of these cases upon the language of the statute there in question, may be applied in all its force to our statute, is sound and should be adopted in construing its provisions. Since the statute distinguishes between the "certificate" and the "duplicate," providing that the certificate is to be filed in the office of the county clerk and the duplicate in the office of the secretary of state, and in the next section declares the subscribers incorporated when the certificate shall have been filed, we may assume the omission of any reference to the duplicate in the latter connection to be intentional, and this assumption is justified if indulged in for the purpose of supporting the validity of a corporation and of rights and franchises honestly intended to be created and acquired. If the object of the statute is to multiply proofs of incorporation, as has been said in one case, the duplicate may be filed now in the office of the secretary of state.

It may be added that the ninth section of our general manufacturing act declares that the copy of the certificate certified by the county clerk or his deputy shall be received in all courts and places as presumptive legal evidence of the facts therein stated. No other method of proving the corporate existence is provided for by that statute, and only on failure to produce such copy and proof of loss of the original does the production of a copy of the duplicate certified by the secretary of state become competent or necessary (*N. Y. Car Oil Co.* agt. *Richmond*, 6 Bosworth, 213).

The production of a copy of the certificate filed with the county clerk, which copy is testified by him, being made evidence of the incorporation by the statute, is sufficient proof of corporate existence and sufficient answer to all allegations of non-incorporation, except in a direct proceeding by the state to annul the franchise (*Jones* agt. *Dana*, 24 Barb., 398).

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The certificate having been duly filed in the office of the clerk, it is immaterial in any action (not brought by the state against the corporation to prohibit its exercise of corporate powers) to inquire whether the duplicate of such certificate has been filed in the office of the secretary of state.

The motion must be denied and injunction dissolved, with ten dollars costs.

Muller agt. Struppmann *et al.*

SUPREME COURT.

MULLER, by guardian, agt. STRUPPMANN *et al.**Partition — when will not be granted — real estate of infants.*

Adam Muller left him surviving his widow and four children, to whom he bequeathed by will the rents and income of his real and personal estate, one-half to his widow and the other moiety to his children, until the youngest attained the age of twenty-one, when, in case of the survival of the widow, one-half of the realty was to be set apart, she to retain the income therefrom until her decease, the other half to be equally divided among the children in fee. In case of the death of the widow before the event mentioned, the whole of the realty to be equally divided in fee, when the youngest child attained the age of twenty-one years, an event, it is conceded, that has not yet happened. Action was brought by the guardian of the infant heirs for partition, and, after sale of their lands, motion is now made to compel the purchasers to take title:

Held, that the supreme court, as a court of equity, has no inherent original authority to direct the sale of the real estate of infants; and that the general provision of the statute declaring that "No real estate, or term of years, shall be sold, leased or disposed of in any manner against the provisions of any last will, or conveyance by which such estate was devised to such infant," was a prohibition upon the power of the court to decree partition and rendered the proceedings void *ab initio*.

Special Term, September, 1878.

George F. & J. C. J. Langbein, for the motion.

Goldfogle & Fisher, Solomon & McNulty, for the purchaser.

D. T. Robertson, as *amicus curiæ*.

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DANIELS, J. — This court, as a court of equity, has no inherent original authority to order the sale of the real estate of infants. It proceeds, on the other hand, by virtue alone of statutory power, and consequently when a departure is made from that authority the court proceeds without jurisdiction, and the acts performed are necessarily void. That principle has been applied and acted upon when adjudications dependent for their validity upon the observance of other statutory regulations have been brought in question (*Bulymore agt. Cooper*, 46 *N. Y.*, 236.) Proceedings of this general nature have often been drawn in question, and practically the same principle has been applied to determine their effect. In order to be maintained they are uniformly required to observe what the legislature, by the statute governing them, may have prescribed.

Proceedings, by petition or action, for the sale of the real estate of infants are of this nature. They have been authorized alone by legislation, and the limits imposed upon them are therefore controlling on the courts. Where they are transcended to that extent the proceeding is without authority, and for that reason invalid. One of these restraints has been imposed upon the sale of infants' lands by a general provision of the statutes, declaring that "No real estate, or term for years, shall be sold, leased, or disposed of in any manner, against the provisions of any last will, or of any conveyance by which such estate or term was devised or granted to such infant" (2 *R. S. [Edmonds' ed.]*, 203, *sec.* 176). This is a general prohibition, including all actions and proceedings by which a sale may be in any manner made, in contravention of which no infants' land can be legally sold. The same reason will apply for preventing the sale in one form as in another. The object of the provision was to prevent the lands of infants from being in any form sold when a sale would defeat the instrument under which the title should be acquired. And all proceedings terminating in such a result must consequently be void, otherwise the courts could practi-

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cally repeal the statute. That was the conclusion which was sustained in the case of *Rogers agt. Dill* (6 *Hill*, 415), and its authority in this respect does not seem to have since been questioned. No such restraint upon the authority of the courts was in the case of *Blakley agt. Calden* (15 *N. Y.*, 617), or in that of *De Forest agt. Farley* (62 *id.*, 628). They were at most simply erroneous and conclusive as to the rights of the parties as long as they remained unreversed. The defect is much more serious than that when this statute applies to the case, for it involves the exercise of authority which the legislature have declared that no court shall possess. And if that can be disregarded, then the means may be supplied by the action of the courts through which the intention of the legislature and of the testators will be at the same time frustrated and defeated. That is a result which courts created to administer the laws should be expected not to sanction by their decisions.

The purchaser of the property sold under the judgment in partition in this case, has declined to accept the title tendered because the sale was made in violation of this provision of the statute. The will under which the point arises was before the general term of this court for consideration in the case of *Young agt. Langbein* (14 *N. Y. Sup. Court*, 151), and so far as its terms become important in the decision of this application, they will be found to be there reported (*Id.*, 154, 155). The testator, by his will, made no direct devise of his real estate, but he gave to his widow one half of its net rents, and the other half of such rents he gave to his children, "until the youngest child shall attain the age of twenty-one years, when said estate is to be divided equally among my said children, absolutely in fee forever." It was, however, further declared that if the testator's widow should then be living, that she should still continue to receive her one-half of the income, and that the division of that half should be postponed until the period of her decease. But the division of the other half was still to be deferred as he had directed it until his youngest

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child should become twenty-one years of age. As to this one-half of his real estate, his intent very evidently was that no division of it should be made while his youngest child remained a minor.

The widow is now deceased, and for that reason the contingency made to depend upon her life is not one important to be further considered. But the other restraint as to the other half of the testator's real estate still remains as the testator declared and created it, and from that, as no sale of the property affected by this judgment was authorized by the act of the executors, it is evident that he designed his children should only have the rents during the minority of his youngest child, and that the property itself should not be divided among them until the youngest child became twenty-one years of age. This was the view taken of this will when the case of *Young agt. Langbein (supra)* was decided, and the restraint was then considered to be operative. And the same conclusion was also expressed concerning a similar devise in the case of *Rogers agt. Dill (supra)*. It has been suggested that a different opinion had been expressed in other actions and proceedings; but no adjudication of that nature has been shown which would justify the least deviation from the principle of those which have been already mentioned. The sale was only one mode for making a division of this half of the testator's estate, when the legislature had declared that it should not be done as long as it contravened the directions he had given.

It has been objected that this restraint produced an unlawful suspension of the power of alienation, and for that reason it was inoperative. But that was not the case, for such a direction as this simply has the effect of preventing a division of the estate until the child attains the age of twenty-one years or previously departs this life. In either event the estate is made dependent on the continuance of the minority before the property becomes divisible (*Lang agt. Ropke*, 5 *Sand.*, 363; *Burke agt. Valentine*, 52 *Barb.*, 412).

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The sale made as to this one half of the estate was unauthorized, and for that reason, without considering the other objections, the motion made to compel the purchasers to accept the title must be denied, and the commissioners must refund the money received by them under the terms of the sale which they made.

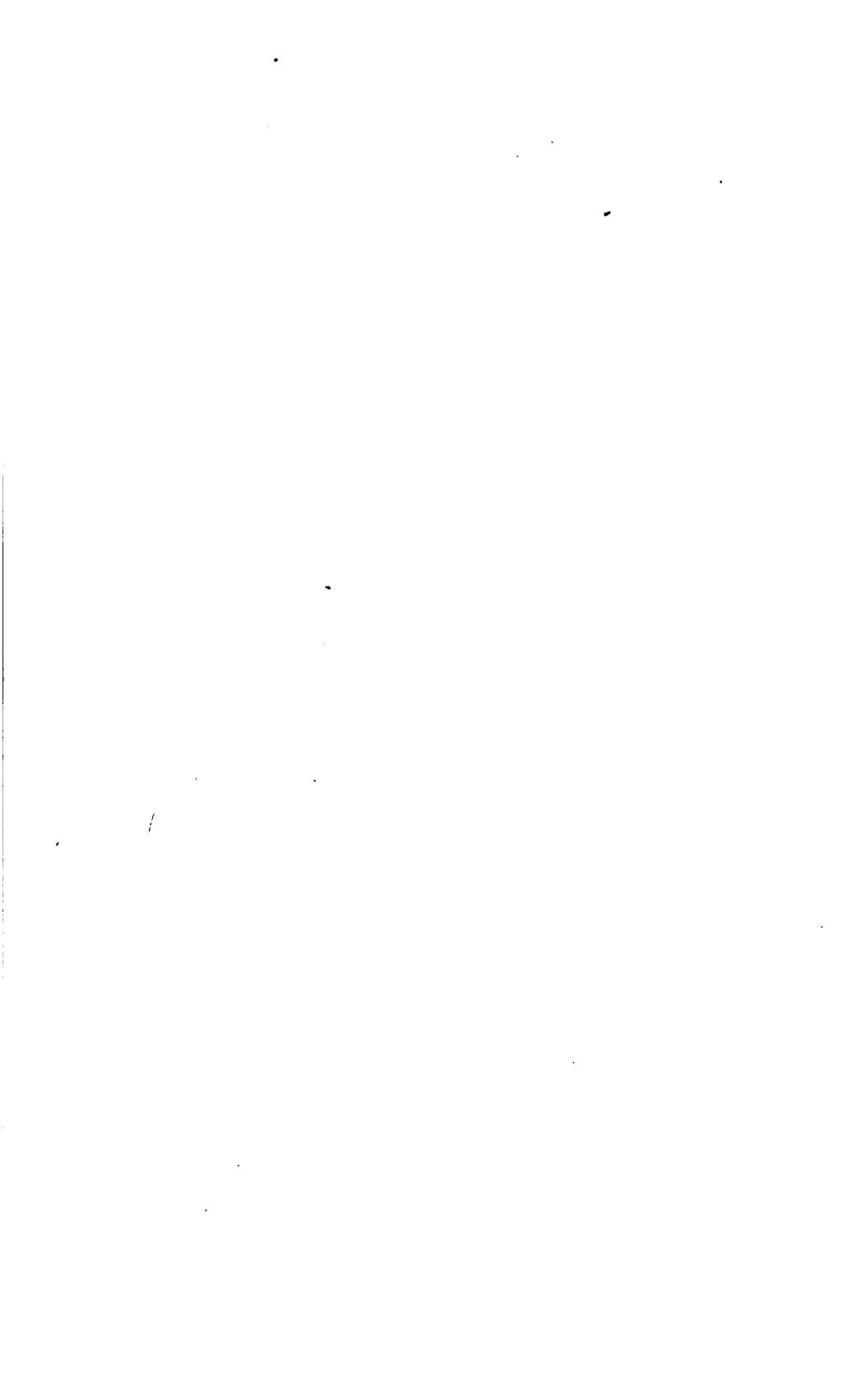
Examining Parties to Action de bene esse.

NOTE. — *Montague* agt. *Worstell* (*ante*, p. 406) was decided in October, 1877, instead of May, 1878, as reported, and lead to an amendment of the statute so as to obviate the objection pointed out. The amendment was passed May 21, 1878, and is chapter 299 of the Laws of that year, and is in these words:

SECTION 1. Section 870 of chapter 416 of the Laws of 1877, entitled "An act relating to courts, officers of justice and civil proceedings," is hereby amended so as to read as follows:

Sec. 870. The deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought in such court, other than a court specified in subdivision sixteenth, seventeenth, eighteenth or nineteenth of section two of this act, may be taken at his own instance or at the instance of an adverse party, or of a coplaintiff or codefendant, at any time before the trial, as prescribed in this article.

Sec. 2. This act shall take effect immediately. [Ed.]



D I G E S T

CONTAINING THE WHOLE OF

55 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 13 HUN, AND 68 AND 69 N. Y. REPORTS.

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ACTION.

1. Where an action is brought upon a judgment rendered in the supreme court between the same parties, without first obtaining leave to bring the action, the court has power to grant such leave *nunc pro tunc*. (*Church agt. Van Buren, ante, 489.*)
2. An action was brought by the plaintiff, a daughter of David Quackenbush, deceased, against his executor, to recover for services rendered by her in attending upon her father during his last illness, she being then married and living with her husband. *Held*, that the husband, and not the plaintiff, was the proper person to bring the action. (*Cuck agt. Quackenbush, 13 Hun, 107.*)

ACTUARY.

See INSURANCE COMPANY.

Matter of North American Life Insurance Company, ante, 465.

ADMINISTRATOR.

1. An administrator cannot recover, in an action at law, money over-
4. An action to recover money claimed to have been paid by mis-

paid to creditors, upon confidence that the assets of the intestate, which are in fact inadequate for the purpose, will eventually be sufficient for paying in full all claims against the estate. The remedy of the administrator is in equity. (*Gulke agt. Uhlig, ante, 484.*)

2. Although the most conclusive proof is not required where defendants are sued as partners, there must be some proof of partnership. (*Id.*)
8. Where the only proof of partnership was the evidence of the plaintiff who swore they were partners because "she knew it in business," "she had heard so," "everybody knew it," "and there was a sign on the store Uhlig & Co.," "she knew only two of the defendants, never saw and did not know the name of the third one," and which of the two defendants named Uhlig was the one she did not determine:

Held, that there was no direct evidence of defendants' copartnership and no proper proof of reputation to that effect and the complaint should be dismissed for this reason. (*Id.*)

Digest.

take of fact, by plaintiff (who was administratrix of her husband's estate), to defendants, should be brought on behalf of the estate and not in her own behalf. (*Id.*)

ADMINISTRATOR'S BOND.

See Costs.

Browning agt. *Vanderhoven et al.*, ante, 97.

ADMIRALTY JURISDICTION.

1. Admiralty jurisdiction does not extend to contracts relating to a vessel wholly engaged in the internal commerce of a state, and no maritime lien or claim can be founded on such contracts. (*Fralick* agt. *Betts*, 18 *Hun*, 632.)

ADMISSIONS AND DECLARATIONS.

1. The declarations of a testator alone, are not competent evidence to prove acts of others amounting to undue influence; but when acts are proved, such declarations may be given in evidence to show the operation they had upon the mind of the testator. (*Cudney* agt. *Cudney*, 68 *N. Y.*, 148.)
2. In an action upon a policy of insurance issued upon the life of a husband for the benefit of the wife, the declarations of the insured, made some time prior to the application for the policy, are not competent to prove the existence of facts showing a breach of warranty, as that he had had a disease denied in the application. But where the facts are otherwise proved, and it is necessary to show that the insured had knowledge thereof, the declarations are competent for that purpose. (*Dilleber* agt. *Horne L. Ins. Co.*, 69 *N. Y.*, 256.)

3. Oral admissions made by one who at the time held the title to land, to the effect that he had contracted by parol to sell the same to another, and had received the pay therefor, are competent evidence against all persons claiming title under or through him. (*Chadwick* agt. *Fonner*, 69 *N. Y.*, 404.)

When declarations of defendant sought to be charged as trustee competent to show trust. (*See Chapman* agt. *Porter*, 69 *N. Y.*, 276.)

When declaration of husband not competent against wife in action by her. (*See De Wolf* agt. *Williams* [Mem.], 69 *N. Y.*, 621.)

ADVERSE PARTY.

1. The term "adverse party," as used in section 348 of the Code, requiring notice of the entry of judgment, affirming the judgment appealed from, to be served upon the "adverse party" at least ten days before commencing an action upon the undertaking, means the parties to the original judgment by whom the appeal was taken. (*Yates* agt. *Burch*, 18 *Hun*, 622.)

AFFIDAVIT.

See ATTACHMENT.

Garlock agt. *James*, ante, 306.

Made after the making of an order at the special term, cannot be read upon the hearing at the general term, even though all the parties to the appeal consent thereto. (*See Thompson* agt. *Taylor*, 18 *Hun*, 301.)

AGENT.

1. Collection agents, to whom notes are intrusted for collection, are liable for moneys received by attorneys employed by them, and

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which are not paid over. (*Mandell et al. agt. Mower et al., ante, 242.*)

AMENDMENT.

1. Where the complaint, in an action to recover rent, alleged a leasing for a term of seven years, *held*, that it was competent to prove a verbal lease for that term or for a shorter period; also, that, if this were not so, the court at special term, on motion for new trial on the judge's minutes made after judgment, could allow an amendment conforming the pleadings to the proof. (*Thomas agt. Nelson, 69 N. Y., 118.*)

ANSWER.

1. Where the complaint was upon a promissory note, and alleged that it was "duly indorsed to the plaintiffs before maturity, for value," and the answer was a denial of any knowledge or information sufficient to form a belief whether the note stated in the complaint was ever transferred or indorsed to plaintiffs, as alleged in said complaint, or otherwise; on motion to strike out answer as sham, false and untrue:

Held, that, the issue made was a material one, and could not be stricken out as sham. (*Roby et al. agt. Hallock, ante, 412.*)

2. An answer to a material fact stated in the complaint, denying sufficient knowledge or information thereof to form a belief, makes a good issue, upon which the plaintiff holds the affirmative, and which it is incumbent upon him to prove. (*Id.*)
3. The court has no power to strike out such an answer. (*Id.*)

See PLEADING.

Robinson agt. Hatch, ante, 55.

4. Where an answer is returned on the ground that the verification of the same is defective, the notice must point out specifically the particulars in which it is defective. (*Snape agt. Gilbert, 13 Hun, 494.*)

APPEAL.

1. Where an appeal has been withdrawn and dismissed by the general term on the consent of the *only* appellant, *no other party to the action* has a right to move the general term afterwards for an affirmance of the order or judgment appealed from. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal. (*Struppmann agt. Muller, ante, 427.*)

2. Where, after such dismissal, the attorney for infant parties to the action, who had no interest in said appeals, after having been informed by the general term that he appeared for a party who had no right to take any proceeding on that appeal, still prosecuted the appeal to the court of appeals:

Held, that he did it at his own risk, as if he were the appealing party, and should be held personally liable for the costs. (*Id.*)

3. Under the provisions of the Code of Civil Procedure an appeal will lie to the general term from a judgment entered upon the report of a referee, in an action pending in a county court, upon a case and exceptions settled by such referee; and a prior motion for a new trial in the county court, upon the exceptions and the decision of the referee is no longer requisite or proper. (*Kilmer agt. O'Brien, 13 Hun, 224.*)

4. By an order of the special term, made upon an application for the confirmation of the report of a referee, two claims presented by one M. to the referee, and allowed

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- by him, were disallowed. *M.* appealed from so much of the order as disallowed one of the said claims. Subsequently and after the decision of the said appeal, he brought this appeal from the portion of the order disallowing the second claim. (*Thompson* agt. *Taylor*, 13 *Hun*, 201.)
5. Affidavits, made after the making of an order at the special term, cannot be read upon the hearing at the general term, even although all the parties to the appeal consent thereto. (*Id.*)
6. Upon an appeal to the county court from a judgment of a justice of the peace, the truthfulness of the justice's return, if it be fully responsive to the notice of appeal, cannot be questioned nor controverted by affidavits, nor can a further return, as to the truth of matters in respect to which the original return is controverted by affidavits, be required. (*Barber* agt. *Stettheimer*, 13 *Hun*, 198.)
7. If the return be false, the remedy of the party aggrieved thereby is by an action against the justice. (*Id.*)
- Questions arising upon a trial — *e. g.*, the form of a judgment in replevin — can only be reviewed upon a case settled. (*See McLean* agt. *Cole*, 13 *Hun*, 300.)
- Demurrer to a portion of a pleading — full costs allowed upon appeal to the general term. (*See Van Gelder* agt. *Van Gelder*, 13 *Hun*, 118.)
- Proper way to correct error as to costs — in an action to foreclose a mortgage. (*See Lossee* agt. *Ellis*, 13 *Hun*, 656.)
8. In an action upon an assigned claim, plaintiff's counsel requested the court to direct a verdict for plaintiff; the court denied the request, submitting, however, to the jury simply the question as to the right of the plaintiff to maintain the action, and charging that if the transfer was "a sham instrument," plaintiff should be defeated, if not, that he was entitled to recover. Plaintiff's counsel excepted to the refusal to direct a verdict. *Held*, that the exception was sufficient to present the question as to plaintiff's right to maintain the action. (*Sheridan* agt. *Mayor, &c.*, 68 *N. Y.*, 30.)
9. Where in an action involving a title to real estate acquired under a sale by an assignee in bankruptcy, no objection is made to the sufficiency of the publication of notice of sale, and no finding or request to find upon the subject, the question cannot be considered here. (*Smith* agt. *Scholtz*, 68 *N. Y.*, 41.)
10. A motion by an assignee of a judgment to vacate a satisfaction thereof, executed by the judgment creditor after assignment, is addressed to the discretion of the court; it may hear and determine the motion on the merits, or may compel the judgment debtor, in order to contest the validity of the judgment and the right of the claimant to collect the amount thereof, to bring an action for that purpose; and the exercise of this discretion cannot be interfered with by this court. (*Concklin* agt. *Taylor*, 68 *N. Y.*, 221.)
11. In an action seeking to charge defendant as a partner with an individual banker, plaintiff offered in evidence a paper purporting to be a certified copy of a certificate filed in the banking department, in accordance with the provisions of the banking act of 1854 (*sec. 6, chap. 242, Laws of 1854*), signed and acknowledged by defendant, certifying that he was interested in the business of the bank, &c. No objection was made to the reception of the paper in

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evidence. *Held*, that the objection could not be raised upon appeal that the statute only made the original certificate evidence, or that no proof was given that the original certificate was signed by defendant; that these objections, to be available, should have been taken on the trial; also that they were not raised by an exception to a denial of a motion for a nonsuit based on the general ground that no partnership had been shown. (*Howell* agt. *Adams*, 68 N. Y., 314.)

12. An attachment cannot be demanded as a matter of right; and whether in a particular case it should issue is within the discretion of the court; an order, therefore, refusing the writ is not reviewable here. (*Sartwell* agt. *Field*, 68 N. Y., 341.)

13. Upon application made by the attorney-general under the act of 1853, in reference to life insurance companies (*sec. 17, chap. 463, Laws of 1853*), for the dissolution of a life insurance company, an order of reference to take proofs touching the application was granted. The motion was opposed upon affidavits to the effect that the corporation had already been dissolved by a judgment in an action brought under the provisions of Revised Statutes (2 R. S., 464, *sec. 89*), providing for proceedings against corporations in equity, in which action a receiver had been appointed. *Held*, that the order did not involve a decision as to the effect of the judgment or the rights of the parties; that it was simply an interlocutory, not a final order; that it did not affect a substantial right; therefore, was not reviewable here. (*In re Atty.-Genl. agt. Cont'l L. Ins. Co.*, 68 N. Y., 343.)

14. An order of special term vacated an attachment "on the defendants stipulating not to bring any actions on the undertaking furnished * * * on the issu-

ing of said attachment, or on account" thereof. Plaintiff appealed from so much of the order as vacated the attachment. On appeal from an order of general term, reversing said order of special term, it was claimed that plaintiff, by appealing only from the portion of the order against it, accepted the portion inuring to its benefit and so waived the right of appeal. *Held*, untenable as the rule invoked only applies where the provisions of the judgment or order are such that a party by not appealing from a part enforces or accepts a substantial benefit therefrom, which did not appear in this case; that the form of the notice of the appeal at most only presented a question of irregularity. (*Wallace* agt. *Castle*, 68 N. Y., 370.)

15. A motion was made at general term to dismiss the appeal to it on the ground of such irregularity. It appeared that defendant's attorney accepted the papers served without objection and without returning them, and that there was *laches* in making the motion. *Held*, that the disposition of the motion was in the discretion of the court; and that an order denying the same was not appealable. (*Id.*)

16. Where an order of general term reversing a judgment entered upon the report of a referee does not state that the reversal is upon questions of fact, unless some error of law appears in the case, the order cannot be sustained in this court; the evidence cannot be looked into here for the purpose of ascertaining whether the general term should have reversed on the ground that the findings of fact were against the weight of evidence. (*Foster* agt. *Persch*, 68 N. Y., 400.)

17. In an action against a married woman for goods sold, the referee found that the goods were pur-

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- chased by defendant's husband as her agent; that she carried on the business for the purposes of which they were purchased, and they were delivered to her; that they were charged to the husband by plaintiffs upon their books, but in so doing they did not intend to exonerate the defendant from liability; and as conclusion of law the referee found that defendant was liable. *Held*, that the findings did not show upon their face that the conclusion was erroneous, and there being some evidence to sustain them, that an order reversing the judgment entered upon the referee's report, which did not state that the reversal was upon questions of fact, was error. (*Id.*)
18. The sufficiency of a notice of appearance by a defendant, in an action in the supreme court, is for that court to determine, and ordinarily cannot be reviewed here. (*Martins* agt. *Louvenstein*, 68 *N. Y.*, 456.)
19. The supreme court has power to overlook or relieve from a violation of, or a non-compliance with its rules, and may permit an act to be done after the time prescribed by such rules. (*Id.*)
20. Accordingly *held*, that a defendant who appeared after judgment was entitled to service of notice of filing the referee's report of sale (*Rule 39 of 1874; Rule 30 of 1878*); and that not having received such notice, exceptions to the report filed by him more than eight days after the filing of the report were in time; but that, even if exceptions were required to be filed in eight days after the filing of the report, the supreme court could permit the filing of, and allow defendant to be heard upon, the exceptions after that time; and that an order authorizing such filing, and recognizing the sufficiency of defendant's appearance was not reviewable here. (*Id.*)
21. Where upon the trial of an action, the court directs a verdict for defendant an exception to the ruling in the absence of any thing from which it may be implied that the right to go to the jury has been waived, is sufficient to present the objection upon appeal, that there were questions of fact which should have been submitted to the jury; it is not necessary to request that any fact be so submitted. (*Trustees, &c.*, agt. *Kirk*, 68 *N. Y.*, 459.)
22. In an action for work and labor done under a contract, the court charged among other things in substance, that if the work was not fully completed plaintiff was entitled to recover for the work actually performed, as defendant had taken possession, and all he could claim was a deduction for what he had to pay for completing the work. *Held*, error; and that it was not cured by a finding of the jury that plaintiff had fully performed. (*Flood* agt. *Mitchell*, 68 *N. Y.*, 508.)
- Final order in proceedings under chapter 639, Laws of 1857, to compel commissioners of adjoining towns to build bridge, is appealable and brings up for review intermediate ones. (*See In re Freeholders*, 68 *N. Y.*, 376.)
23. The provision of the general railroad act (*sec. 18, chap. 140, Laws of 1850*), making the decision of the supreme court final in the matter of appraisal of lands taken for railroad purposes by proceedings *in invitum* was not abrogated by the provision of the act of 1854 (*chap. 370, Laws of 1854*), "in relation to special proceedings" authorizing an appeal from "a final order affecting a substantial right made in a special proceeding." This relates solely to the ordinary special judicial proceedings under the general provisions of law regulating the practice of courts of

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- justice. (*In re D. and H. Canal Co.*, 69 N. Y., 209.)
24. A proceeding under the statute relating to voluntary assignments by judgment debtors (2 R. S., 31 *et seq.*) is a special proceeding, as defined by the Code (*secs.* 1, 2, 3); and an order of special term therein discharging the petitioner is a final order, and is appealable to the general term, under the provisions of the act of 1854 (*chap.* 270, *Laws of 1854*) authorizing appeals in special proceedings. (ALLEN and MILLER, JJ., dissenting.) (*In re Brady*, 69 N. Y., 216.)
25. The right to review a special term decision in a matter affecting substantial right, being general and fundamental, will be deemed to exist unless the intent to destroy it is expressed with great clearness. (*Id.*)
26. The rule which sanctions the introduction of record evidence upon an appeal, has no application to the ordinances of a municipal corporation. (*Porter agt. Waring*, 69 N. Y., 250.)
27. *It seems* that such evidence can only be received upon appeal to uphold the judgment, not to reverse it. (*Id.*)
28. The provision of the act of 1832 (*sec.* 1, *chap.* 153, *Laws of 1832*), authorizing ordinances of the common council of the city of New York to be read in evidence in all courts, relates to their introduction upon a trial, not to their being read in an appellate tribunal. (*Id.*)
29. Where the defense of usury is interposed, the affirmative of the issue is upon the defendant, and where the case is tried by a referee and the transaction is equivocal, defendant must give evidence of facts showing the alleged illegal intent, and have the fact found by the referee; it cannot be adjudged in the first instance by this court on appeal. (*Haughtwout agt. Garrison*, 69 N. Y., 339.)
30. In an action upon guaranties of certain bonds, where the defense was usury, the referee found in substance that plaintiffs having commenced legal proceedings against defendant S., and caused his property to be attached, S. agreed to settle by paying his indebtedness and the costs and expenses of the proceedings; that plaintiffs presented their account, in which they charged \$500 counsel fees, claimed to have been paid or incurred in the proceedings, and refused to release the attachment unless it was paid; that S. thereupon allowed the same, and the bonds in question, with guaranties, were given on the settlement. There was no finding or request to find that the \$500 was paid as a consideration for forbearance and that it was plaintiffs' intent to exact usurious interest. *Held*, that the question of usury could not be raised upon the record. (*Id.*)
31. The provision of the Code (*sec.* 330) authorizing the appellate court on appeal from a judgment to reverse, affirm or modify the judgment does not authorize the general term where it has decided that a judgment in favor of plaintiff in an action upon a contract for services, or upon a *quantum meruit*, is erroneous, to determine upon the examination of conflicting evidence what sum plaintiff ought to recover, and render judgment therefor; it should in such cases award a new trial. (*Whitehead agt. Kennedy*, 69 N. Y., 462.)
32. *It seems* that when in an action upon a contract a recovery has been had upon distinct and separate items, and error either of fact or law has been committed in respect to one or more of them, the general term may, if no other error exists, instead of reversing the judgment absolutely, reverse it

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only as to the erroneous items, and affirm it as to the residue; provided the plaintiff consents to forego his claim to recover them. (*Id.*)

33. The authorities holding that on appeal from an order made on motion to set aside a verdict for excessive damages, in an action of tort for injuries to the person the general term has power to make an order reversing the judgment and granting a new trial, unless the plaintiff consent to reduce the damages to a specified sum, and in that case affirming it for that amount, distinguished. (*Id.*)

34. An order of general term reversing a judgment entered upon a decision of the court on trial without a jury, which order does not direct a new trial and upon which no judgment has been entered, is not reviewable in this court; it is not an order granting or refusing a new trial, or a final judgment. (*Rust agt. Hauselt*, 69 *N. Y.*, 485.)

35. An executor, committed to the county jail by virtue of a warrant of commitment issued by a surrogate upon an order adjudging said executor in contempt for disobedience of a final decree, directing him to pay over a sum specified to various parties named, was discharged by order in proceedings on *habeas corpus*. The general term, on writ of *certiorari* affirmed the proceedings. *Held*, that one of the parties named in the surrogate's decree as entitled to a portion of the sum, who was not named in the writ of *certiorari*, had no such standing in the proceedings as to entitle her to appeal to this court. (*In re Watson agt. Nelson*, 69 *N. Y.*, 537.)

36. Where an order of special term, quashing a return to a writ of alternative *mandamus* and directing a peremptory *mandamus*, is reversed by the general term, with liberty to the relator to de-

mur or to take issue upon the allegations of the return, the order of general term is not appealable to this court; it is not a final order, nor does it affect a substantial right, and it is a matter of discretion. (*People ex rel. agt. Clyde*, 69 *N. Y.*, 603.)

37. A notice of motion to dismiss an appeal to this court is not fatally defective because of an omission to specify therein upon what papers the motion will be made; the nature of the motion apprises the appellant that it is based upon the record. (*Browne agt. Taylor*, 69 *N. Y.*, 627.)

Where upon trial the only question raised is as to plaintiff's right to recover anything, an exception to a decision thereof in favor of plaintiff does not present for review any question as to amount. (*See Jarvis agt. Driggs*, 69 *N. Y.*, 143.)

When question not presented by pleading or on trial cannot be raised on appeal. (*See Raplee agt. Arnot* [Mem.], 69 *N. Y.*, 616.)

APPEARANCE.

1. But a non-resident defendant, after attachment and service by publication, cannot specially appear to contest the liability on his part asserted by the plaintiff, and to claim that the court has no jurisdiction over and above the value of the property attached. In other words, he cannot, on an alleged special appearance, obtain all the advantages of contesting his entire indebtedness which would follow from a general appearance, and yet avoid the disadvantages resulting from such appearance. (*Swift et al. agt. Tross et al.*, ante, 255.)

2. Where a non-resident defendant does not appear, after service by publication, and no property has been attached, the court acquires

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no jurisdiction, and where property has been attached and the non-resident defendant does not appear, the proceeding is effectual and binding merely as a proceeding *in rem*, and is regarded as having no operation beyond the disposition of the property or some interest therein. (*Id.*)

3. A defendant in an action to foreclose a mortgage may appear therein by attorney after judgment, and upon such appearance is entitled to notice of subsequent proceedings. (*Martine agt. Lowenstein, 88 N. Y., 456.*)

4. The sufficiency of a notice of appearance by a defendant, in an action in the supreme court, is for that court to determine, and ordinarily cannot be reviewed here. (*Id.*)

ARBITRATION.

1. The defendant issued to the plaintiff a policy of insurance upon certain personal property, by which it agreed to make good unto the assured all such immediate loss or damage as should happen by fire to the property specified, *the amount of loss to be estimated according to the actual cash value of the property at the time of the loss.*

In the ninth condition of the policy it was provided that in case differences should arise touching any loss or damage, after proof had been received in due form, the matter should, *at the written request of either party*, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy.

In the tenth condition of the policy it was provided that no suit or action against the company, for the recovery of any claim by virtue of the policy, should be

sustainable in any court of law or chancery, *until after an award shall have been obtained, fixing the amount of such claim in the manner above provided.*

In this action, brought to recover the amount due thereunder, upon the destruction of the property, the defendant claimed that a difference had arisen as to the value of the property destroyed, and that as no award had been made by arbitrators, no recovery could be had under the policy. Neither party had requested, either in writing or otherwise, that the matter should be submitted to arbitrators.

Held, that by the terms of the ninth condition, no obligation to submit the amount of the loss to arbitrators arose, until a *written request* so to do had been made by one of the parties. (*Gibbs agt. Continental Ins. Co., 13 Hun, 611.*)

2. *Semble*, that the condition as to submitting the amount of the loss or damage to arbitrators was only collateral to the main agreement of the defendant, which was to pay the amount of the loss, "to be estimated according to the actual cash value of the property at the time of the loss," and that such collateral agreement did not deprive the plaintiff of the right to maintain an action on the policy until such reference and an award, in pursuance thereof, had been had (*Id.*)

ARREST.

1. Facts independent of the cause of action, entitling a party to an order of arrest, should be stated on affidavit, and should not be stated in the complaint. (*Mather agt. Hannaur, ante, 1.*)
2. The only true construction to be put upon the last clause of section 558 of the Code of Civil Procedure is, that if the complaint served after obtaining the order of arrest

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- should be for a case not mentioned in sections 549 or 550, but a case or cause of action wherein no provision is made for an arrest, then the moving party would be entitled to an order setting aside the order of arrest. It was not designed to extend or alter the rule that had been established under the old Code (*Following Williams agt. Norton*, 54 *How.*, 509, and *Thompson et al. agt. Friedberg*, *id.*, 519; and is adverse to *Bowery National Bank agt. Duryea*, *id.*, 450). (*Id.*)
3. That the order of arrest was not signed by the attorney, as required by section 561, is not fatal to the order of arrest. Although it is an irregularity which should not be overlooked or omitted in practice, such omission may be supplied by amendment under sections 723, 724. (*Id.*)
 4. Whether the name of the attorney upon the back of the order, and put at the end or face of it, would be a sufficient compliance with the provision of section 561, *quære*. (*Id.*)
 5. The failure to serve a copy of the undertaking upon the defendant at the time of the arrest (as would seem to be required by sections 559, 562), is only an irregularity, and does not entitle a defendant to his discharge. (*Id.*)
 6. A plaintiff who fails in an action of tort, in which the defendant was liable to arrest, may be arrested on an execution against his person for the costs of such action. (*Brown agt. Brockett*, *ante*, 32.)
 7. To justify vacating an order of arrest under the last clause of section 558, it must affirmatively appear by the complaint that the cause of action is such that in no event could the defendant be arrested within sections 449 or 450. (*See, to same effect, Williams agt. Norton*, 54 *How.*, 509; *Thompson et al. agt. Friedberg*, 54 *id.*, 519; *Mather agt. Hannaur*, *ante*, 1; *contra, Bowery National Bank agt. Duryea*, 54 *How.*, 450.) (*Sloan et al. agt. Livermore et al.*, *ante*, 85.)
 8. Facts upon which an order of arrest is based, which are extrinsic to the cause of action, need not be set forth in the complaint (*Reversing S. C.*, 54 *How.*, 450). (*Bowery National Bank agt. Duryea*, *ante*, 88.)
 9. Defendants arrested in an action to recover chattels wrongfully concealed or disposed of, may, under the new Code, either give an undertaking to pay any judgment finally recovered, or be admitted to the liberties of the jail upon the ordinary limit bond. (*Levy et al. agt. Kaim et al.*, *ante*, 136.)
 10. An order of arrest will be vacated where the allegations of fraud are unproven, and where there is no motive shown to cheat. (*Anderson agt. Hunt*, *ante*, 336.)
 11. Evidence of false and fraudulent representations commented upon and declared insufficient to sustain the order of arrest. (*Id.*)
 12. November 20, 1869, an order for the arrest of the defendant was granted in this action, and on December 28, 1869, a motion to vacate the same was denied with leave to renew the motion on showing the amount secured by an attachment previously issued in the action. In 1872 the action was tried and judgment recovered by the plaintiff. In February, 1877, this motion was made to vacate the order of arrest. *Held*, that it was properly denied as the leave to renew was only given for a special purpose, and the right to renew was terminated by the entry of the judgment. (*Mills agt. Rodewald*, 13 *Hun*, 439.)
 13. A policeman has no authority to arrest, without a warrant, a per-

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- son violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace. (*Hennessey agt. Connolly*, 13 *Hun*, 178.)
14. The rule, that a reasonably clear case must appear to authorize the granting of an order of arrest, applies, and the order should not be granted, where the propriety of granting it depends upon a doubtful and important question of law. (*Cormier agt. Hawkins*, 69 *N. Y.*, 188.)
 15. As to whether, where a party, who has availed himself of an undertaking by prosecuting it to judgment, can thereafter maintain an action against a surety thereto for deceit, based upon the alleged falsity of the affidavit of justification, *quære*. (*Id.*)
 16. The right to maintain such an action is at least too doubtful to justify a preliminary order of arrest. (*Id.*)
- ing year, or that some of the lots had not been valued at all preceding the assessment. (*Id.*)
3. It was the duty of the persons affected to have appeared before the commissioners in person and interposed their objections. (*Id.*)
 4. Sales made by the clerk of arrears in the city of New York for unpaid assessments for opening public parks, streets and avenues may be vacated for irregularity under chapter 358, Laws of 1858, as amended by chapter 383, Laws 1870, and chapter 312, Laws 1874. (*Matter of Deering*, *ante*, 296.)
 5. The opening of a public park, street or avenue under the act of 1813 (*chap.* 86), is a "local improvement." (*Id.*)
 6. An assessment for a local improvement in said city is not due or a lien until the title thereof is entered in a record of titles of assessment lists confirmed in the office of the clerk of arrears and street commissioner. It is erroneous, therefore, to charge interest thereon from the date of confirmation. (*Id.*)

ASSESSMENTS.

1. The proceedings of the commissioners under the act of 1813, regulating the opening of streets, are judicial, and their report, when confirmed by the supreme court, is final and conclusive and cannot be reviewed for irregularity, mistake or error. The judgment of the court is conclusive as to all questions litigated or which might have been litigated in the proceeding. (*Methodist Episcopal Church of Harlem agt. Mayor*, *ante*, 57.)
2. An action in equity cannot be maintained to set aside or reduce assessments imposed by the commissioners in such proceedings, upon the ground that the assessments exceeded one-half of the valuation of several of the lots, as made by the assessors the preceding year, or that some of the lots had not been valued at all preceding the assessment. (*Id.*)
3. It was the duty of the persons affected to have appeared before the commissioners in person and interposed their objections. (*Id.*)
4. Sales made by the clerk of arrears in the city of New York for unpaid assessments for opening public parks, streets and avenues may be vacated for irregularity under chapter 358, Laws of 1858, as amended by chapter 383, Laws 1870, and chapter 312, Laws 1874. (*Matter of Deering*, *ante*, 296.)
5. The opening of a public park, street or avenue under the act of 1813 (*chap.* 86), is a "local improvement." (*Id.*)
6. An assessment for a local improvement in said city is not due or a lien until the title thereof is entered in a record of titles of assessment lists confirmed in the office of the clerk of arrears and street commissioner. It is erroneous, therefore, to charge interest thereon from the date of confirmation. (*Id.*)
7. An assessment will be vacated where in point of fact it is not levied for works which can be said to have been performed under the act. (*Matter of Van Buren*, *ante*, 513.)
8. The act of 1871 (*Laws of 1871, chapter 566*) contemplated and provided for an assessment for expenses incurred in constructing drains. Where, as in this case, the great bulk of the assessment was for work done in filling up sunken lots:
Held, that it was a "substantial error," within the act of 1874 (*Laws of 1874, chapter 312*), and that the assessment should be vacated and set aside. (*Id.*)
9. The corporation cannot, under the garb of exercising the author-

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ity conferred by a certain act, exercise another and a totally different power, conferred by other and different legislative acts, and involving another and different procedure. (*Id.*)

See Cosrs.

Matter of Jettler, ante, 67.

ASSIGNEE.

1. An action was brought upon a promissory note made by the defendant Warner, to the order of and indorsed by one Ayer, and subsequently indorsed by one Alexander, and by him transferred to the plaintiff. Alexander died before the trial. The signatures of the maker and indorsers were proved. Ayer was called by the defendants, the legal representatives of Warner, and against plaintiff's objection and exception allowed to testify as to a personal transaction, between himself and Alexander, tending to establish the defense of usury.

Held, that Richardson was an "assignee" of Alexander, within the meaning of section 399 of the Code:

That Ayer was a person "from, through or under whom" Richardson derived title within the meaning of that section.

That the fact that the defendants, the legal representatives of Warner, by whom Ayer was called, did not derive title from him, did not render him competent.

That the evidence should have been excluded. (*Richardson agt. Warner, 13 Hun, 18.*)

2. Under section 329 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, the witness would have been competent, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. (*Id.*)

ASSIGNMENT.

1. Although an assignment giving preferences is void under the bankrupt act, under the conditions therein provided, it is void only as to persons and proceedings under that act, and except as to such persons and proceedings it is valid as ever. (*Williams agt. Pitte, ante, 331.*)
2. A voluntary assignment under the laws of Ohio takes precedence of a fund in this state, as against a subsequent attachment instituted at suit of creditors. (*Kelstadt agt. Reilly, ante, 373.*)
3. Property assigned cannot be reached on attachment based on the charge that the assignment was made to defraud creditors, if the property has changed its form. That is moneys arising from assigned claims cannot be attached, though the claims could have been reached, had the attachment been levied before they were changed into money. (*Matter of Fred, ante, 386.*)

ATTACHMENT.

1. An attachment should not issue unless it clearly appears that but one construction is to be placed on the acts of the party against whom the attachment is asked — a construction unfavorable to honesty. (*Andrews agt. Schwartz et al., ante, 190.*)
2. Persons who are sued have a perfect right to give up business if it does not pay, or their factory or place of business is burned out, to collect their debts and assets, and to pay or secure their creditors. (*Id.*)
3. There is nothing in these circumstances to warrant the granting of an attachment on the ground that defendants were about to dispose of their property, and to leave

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- the state, in order to defraud their creditors. (*Id.*)
4. Prior to 1831 *non-residents* could only be proceeded against by either a *warrant* or *long attachment*. Either process might be used in the commencement of suits against *non-residents* previous to the act of 1831. (*Garlock* agt. *James*, *ante*, 306.)
 5. By the act of 1831 no new process for the commencement of actions against *non-residents* was created. This act withdrew from use (except in a few excepted cases) the warrant previously available against *non-residents*, and extended for use against them a summons, the use of which hitherto had been prohibited, and also shortened the time for the return of both the summons and attachment. (*Id.*)
 6. In order to have the benefit of an attachment against a *non-resident* the applicant must aver the facts that are necessary to be now averred to entitle a party to a long attachment, and superadd to that the facts which change the time for its return from not less than six nor more than twelve days to not less than two nor more than four days. In other words aver what is necessary to change it from a *long* to a *short attachment*. (*Id.*)
 7. The affidavit must also give *facts* from which the justice (to whom the application for a *short attachment* against a *non-resident* is made) could judicially determine that the case is one in which a warrant could not issue, or at least it must furnish the best evidence attainable of the fact that a warrant could not issue. (*Id.*)
 8. In an action brought in a justice's court against a non-resident by a *short attachment*, the affidavit on which the attachment was obtained read as follows: "ONEIDA COUNTY, ss.: W. G., being duly sworn, deposeth and saith that P. J. is justly indebted to this deponent on a demand arising upon contract in the sum of seventy-six dollars or more over and above all discounts which the said P. J. may have against him. And deponent further saith that the said P. J. is not a resident of the county of Oneida, and that no warrant can issue against him on the demand of this deponent according to the act to abolish imprisonment for debt and to punish fraudulent debtors."
 - Held*, that the attachment was improperly issued because the affidavit does not state *facts and circumstances* which, under section 26, article 2, title 4, chapter 2, part 3 of the Revised Statutes, or under section 34 of chapter 300 of the Laws of 1831, would entitle the plaintiff to a long attachment.
 - Held*, also, that the affidavit is defective, in that it does not give facts showing how the demand of the plaintiff arose upon contract, and that it states no *facts or circumstances* showing that the demand is not one in which a warrant could be issued against the defendant. (*Id.*)
 9. A voluntary assignment under the laws of Ohio takes precedence of a fund in this state, as against a subsequent attachment instituted at suit of creditors. (*Kelstadt* agt. *Reilly*, *ante*, 378.)
 10. Where a motion is made by a judgment creditor of defendant to set aside plaintiff's attachment, granted prior to recovery of judgment (upon an affidavit showing that she has acquired a lien upon the property of defendant), because of the insufficiency of the affidavits on which it was granted, the plaintiff may offer new proof, by affidavits, sustaining the grounds for attachment recited in the warrant. (*Stouven County Bank* agt. *Alberger*, *ante*, 481.)

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11. For this purpose a lienor must be regarded as included in the term "defendant" as used in the first clause of the second sentence of section 683. (*Id.*)
12. A motion to vacate an attachment on the ground of the insufficiency of the affidavits on which it was granted, can be made by a defendant only. A mere lienor can only move to vacate upon affidavits on his own part, in which case the plaintiff may oppose such motion by new proofs, limited, however, to such proof as tends to sustain the ground for the attachment, recited in the warrant, except in the case specified in the last clause of section 683. (*Id.*)
13. *It seems* that the new Code is to permit a lienor to vacate an attachment which stands in his way, on any ground formerly open to him, or upon affidavits controverting those upon which the attachment was issued, but not upon the ground of irregularity. (*Id.*)
14. Property assigned cannot be reached on attachment based on the charge that the assignment was made to defraud creditors, if the property has changed its form. That is moneys arising from assigned claims cannot be attached, though the claims could have been reached, had the attachment been levied before they were changed into money. (*Matter of Freel, ante, 386.*)
15. Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue. (*Cochran agt. Ingersoll, 13 Hun, 368.*)
16. An attachment cannot be demanded as matter of right; and whether in a particular case it should issue is within the discretion of the court; an order, therefore, refusing the writ is not reviewable here. (*Sartwell agt. Field, 68 N. Y., 341.*)
17. It is not necessary, in order to give jurisdiction to issue an attachment under the Code (*sec. 227*), that the affidavit should state specifically that a summons has been issued or served; a statement that an action has been commenced is sufficient. (*Wallace agt. Castle, 68 N. Y., 370.*)
18. To authorize the issuing of an attachment it is not necessary that a summons shall have been served; for that purpose "an action shall be deemed commenced when the summons is issued." (*Code, sec. 227, as amended in 1866.*) (*Id.*)
19. The fact that a debtor, who resides in another state, has a place of business within this state, does not make him a resident here, so as to prevent the issuing of an attachment against him as a non-resident. (*Id.*)
20. An order of special term vacated an attachment "on the defendants stipulating not to bring any actions on the undertaking furnished * * * on the issuing of said attachment, or on account" thereof. Plaintiff appealed from so much of the order as vacated the attachment. On appeal from an order of general term, reversing said order of special term, it was claimed that plaintiff, by appealing only from the portion of the order against it, accepted the portion inuring to its benefit, and so waived the right of appeal. *Held*, untenable, as the rule invoked only applies

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where the provisions of the judgment or order are such that a party by not appealing from a part enforces or accepts a substantial benefit therefrom, which did not appear in this case; that the form of the notice of appeal at most only presented a question of irregularity. (*Id.*)

21. A sheriff, who has taken property by virtue of a warrant of attachment issued under the Code, is not entitled to poundage in case of a subsequent settlement of plaintiff's claim before any sale of the property by the sheriff. (FOLGER and MILLER, JJ., dissenting.) (*Ger. Am. Bk. agt. M. R. Coal Co., 68 N. Y., 585.*)

22. Section 243 of the Code, as amended in 1865 only allows poundage in case of a sale by virtue of the attachment before judgment; and then only in case a settlement has been had or a judgment recovered and collected in whole or in part, in which cases poundage is to be estimated on the amount collected, or "the amount at which settlement is made." (FOLGER and MILLER, JJ., dissenting.) (*Id.*)

23. In an action against a sheriff for failure to return an execution, it may be proved in mitigation of damages, that prior to the return day the plaintiff's interest in the judgment was levied upon by virtue of an attachment, and was liable to be applied thereon. (*Wehle agt. Connor, 69 N. Y., 546.*)

24. Where a sheriff having an execution in his hands receives an attachment against the judgment creditor, and by virtue thereof levies upon the judgment debt, the attachment becomes a lien upon the judgment and execution, and all moneys collected upon the execution are liable to be applied toward the payment of any judgment recovered in the action wherein the attachment was is-

sued; and, until the attachment is vacated, or the lien thereof in some manner discharged, it must be regarded as valid process, and the sheriff has no right to pay over to the judgment creditor moneys collected on the execution. (*Id.*)

25. Where, therefore, it appears in an action against the sheriff for failure to return the execution that such a lien by attachment existed at the time of the commencement of the action, plaintiff is only entitled to nominal damage. The defendant's failure to perform his duty, although not justified or excused, does not entitle plaintiff to recover more than the damages he has actually sustained. (*Id.*)

26. Where the sheriff acted lawfully in levying the attachment, the question, whether he acted in bad faith, cannot be considered in such action, as the rights of the attaching creditors could not be affected thereby. (*Id.*)

27. *It seems* that in order to make a valid levy by virtue of the attachment, when the sheriff himself holds the execution, it is not necessary to serve notice of the property levied on, as required by section 235 of the Code. (*Id.*)

ATTORNEY AND CLIENT.

1. Where an appeal has been withdrawn and dismissed by the general term on the consent of the *only* appellant, *no other party to the action* has a right to move the general term afterwards for an affirmance of the order or judgment appealed from. The party appellant or the parties appellants are the only parties who can move the court in favor of the appeal. (*Struppmann agt. Muller, ante, 427.*)

2. Where, after such dismissal, the

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attorney for infant parties to the action, who had no interest in said appeals, after having been informed by the general term that he appeared for a party who had no right to take any proceeding on that appeal, still prosecuted the appeal to the court of appeals:

Held, that he did it at his own risk, as if he were the appealing party, and should be held personally liable for the costs. (*Id.*)

8. The defendant's intestate and the plaintiff's testator entered into an agreement whereby the former, an attorney, agreed to collect the rents due on certain manorial leases belonging to the latter, and to receive for such services the taxable costs of the actions to be brought; under which agreement some twenty or thirty actions were commenced. At the time of the death of defendant's intestate, plaintiffs had been defeated in one action because of a failure to notify the tenant of an assignment of the lease, two actions had been discontinued and the costs paid, and seven were pending; to the two actions discontinued and the seven actions still pending, the same defense of neglect to give notice of the assignment of the lease had been interposed. Upon an accounting, the referee found that the amount of the taxable costs in said nine actions was \$901.81, but refused to allow that amount to the defendant. The court at special term held that as the notice was not properly a proceeding in the action, that the mere fact that the defendant's intestate commenced the actions for the assignee of the lease, without ascertaining that the tenant had been notified of the assignment, was not sufficient to show that he was guilty of negligence or wanting in reasonable professional skill, and allowed to the defendant the \$901.81.

Held, that the defendant should be allowed that amount. (*Seymour* agt. *Cagger*, 13 *Hun*, 29.)

4. Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively.

A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill. (*Id.*)

5. The fact that an attorney was employed by one proposing to loan money on bond and mortgage to draw the papers, and that the money was advanced upon the securities through the attorney, is no proof of authority upon his part to collect the principal, where he has not been entrusted with the custody of the securities; nor can it be inferred that the attorney was authorized to receive the principal, from the fact that he had authority to collect the interest. (*Smith* agt. *Kidd*, 68 *N. Y.*, 130.)
6. *It seems*, that even if the attorney has been usually employed by the lender to receive moneys, or has on other occasions received principal which he has paid over, this does not constitute such an authority. (*Id.*)
7. The possession of the securities by the attorney, in the absence of proof *aliunde* of express authority, is the indispensable evidence of his authority to collect the principal. (*Id.*)
8. Even if an attorney have authority to receive payment of an obligation, this does not authorize him to receive it before it is due. (*Id.*)
9. Where an attorney in an action is in contempt for the violation of an injunction therein, or for any act inconsistent with his relation to the court, and suitors have sustained damage, the rem-

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edy is by summary proceedings, not by action. (*Foster* agt. *Townshend*, 68 N. Y., 208.)

10. An attorney is not authorized by his retainer, to satisfy a judgment without payment, or to compromise or release the same; nor can he settle a suit and conclude his client in relation to the subject in litigation without consent of the latter. (*Mandeville* agt. *Reynolds*, 68 N. Y., 529.)

11. An attorney employed to collect a claim has authority by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings thereon, and to procure the appointment of a receiver; these are proceedings in the suit. (*Ward* agt. *Roy*, 69 N. Y., 96.)

12. But it seems he has not authority by virtue of such retainer to commence an action in the name of the receiver against a third person, to set aside as fraudulent a conveyance from the judgment debtor. (*Id.*)

13. The F. S. M. Co., a foreign corporation, had a general office in New York in charge of B., as agent. He had charge of collections in this state, and employed an attorney to collect a promissory note in his possession, belonging to the company. The attorney obtained judgment and instituted supplementary proceedings thereon, in which plaintiff was appointed receiver. This action was brought by and at the instance of said attorney to set aside as fraudulent a conveyance by the judgment debtor to defendants. B. did not authorize and was not informed of the commencement of the action; he was, however, advised thereof before trial, and recognized the action of the attorney as being for the company. Defendants succeeded in their defense, and moved that the company be compelled to pay the

costs. *Held*, that the facts justified the inference that the company, through B., with a knowledge of all the attorney had done, ratified his acts, and it was bound by them, although the attorney had no authority originally to commence the action; and that the company was properly charged with the costs. (*Id.*)

14. The provision of the Code (*sec.* 303), repealing former restrictions, and declaring that the measure of compensation for the services of an attorney shall be left to the agreement between him and his client, has no application to a contract in relation to services already rendered, but has reference only to prospective services. (*Whitehead* agt. *Kennedy*, 69 N. Y., 462.)

15. As to whether said provision qualifies in any manner the general principle requiring an attorney, seeking to avail himself of a contract made with his client, to establish affirmatively that it was made by the latter with full knowledge of all the material circumstances known to the former, and was in every respect free from fraud on his part, or misconception upon the part of the client, and that a reasonable use was made by the attorney of confidence reposed in him, *quære*. (*Id.*)

AWARD.

1. A liberal interpretation will be given to the submission to, and to the award of arbitrators, so as to uphold the latter when not attacked for corruption or misconduct of the arbitrators. (*Curtis* agt. *Gokey*, 68 N. Y., 300.)

BANKRUPT ACT.

1. The defendants were indorsers of a promissory note held by the plaintiffs. After the giving of the

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note, but before its maturity, the defendants instituted proceedings under the bankrupt act to procure a discharge from their debts by a compromise proposed to, and accepted by the creditors. They set forth in the statement of their debts this note, and tendered to the plaintiffs the twenty-five per cent accepted by the other creditors, but the same was rejected. After defendants' discharge this action was brought upon the note.

Held, that their liability thereon was not affected by the proceedings in bankruptcy; that the compromise only released them from those debts or liabilities which had then become fixed and due, and not from debts on which they were only contingently liable. (*Smith* agt. *Krawaskopf*, 13 *Hun*, 526.)

2. Under the provisions of the bankrupt act prohibiting any creditor who has proved his debt or claim from maintaining any suit at law or in equity thereupon against the bankrupt, unless a "discharge has been refused or the proceedings have been determined without a discharge," the proceedings are not determined unless an order to that effect has been entered by the United States court. (*Miller* agt. *O'Kain*, 13 *Hun*, 594.)
3. If a creditor has proved his claim against the bankrupt, a surety for the bankrupt, who, after such proof thereof, pays the debt, occupies the position of the original creditor as to the enforcement of the claim by suit. (*Id.*)
4. This action was brought upon an undertaking given to procure the discharge from arrest of one Miller, who had been sued by the plaintiff, as an assignee in bankruptcy, to recover money collected by Miller for the bankrupt, which he had failed to pay over. Plaintiff having recovered a judgment in the first action for \$2,195.50 and taken the necessary measures

to charge the bail, brought this action upon the undertaking.

Held, That the action was properly brought in the state court and could be maintained. (*Tullis* agt. *Miller*, 13 *Hun*, 363.)

5. That even if the amendment to the bankrupt act, passed in 1874, operated in any case to deprive the state courts of jurisdiction over an action brought by an assignee in bankruptcy, this case was not affected thereby, for the reason that the cause of action did not arise under the laws of the United States, and that it was not brought for the collection of the legal assets or debts of the bankrupt. (*Id.*)

BANKRUPTCY.

1. *It seems* that an order in proceedings for the sale by a general assignee in bankruptcy of the property of the bankrupt, directing the sale of the right, title and interest, &c., of the bankrupt, is sufficient; it is not necessary that it should direct the sale of the right, title and interest which the assignee acquired by the decree in bankruptcy. (*Smith* agt. *Scholtz*, 68 *N. Y.*, 41.)
2. As to whether Rule 70 of the United States district court for the southern district of New York, providing that all notices of proceedings in bankruptcy required to be published shall be inserted in at least three of certain papers named, applies to notices of sale by general assignees in bankruptcy, *quære*. (*Id.*)
3. Where, in an action involving a title to real estate acquired under a sale by an assignee in bankruptcy, no objection is made to the sufficiency of the publication of notice of sale, and no finding or request to find upon the subject, the question cannot be considered here. (*Id.*)

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BILL OF PARTICULARS.

1. The complaint in this action alleged that in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, and that the same were wrongfully taken and carried away by the defendant herein and converted to his own use.

Held, that the action was a proper one in which to order a bill of particulars. (*Robinson* agt. *Comer*, 13 *Hun*, 291.)

BONA FIDE HOLDER.

1. In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a *bona fide* holder for value; this presumption is not repelled merely by proof that the paper as between the immediate parties was without consideration, and was made, indorsed or accepted by one for the sole accommodation of the other. (*Harger* agt. *Worrall*, 69 *N. Y.*, 870.)
2. Where, therefore, in an action by an indorsee before maturity against the acceptors of a bill, the defense was that the acceptance was without consideration and solely for the accommodation of the drawer, and that it was discounted by plaintiffs for the drawer, at a usurious rate of interest, *held*, that the burden was upon defendants to show the amount paid by plaintiffs for the bill, and in the absence of any evidence upon the subject, that plaintiffs were entitled to recover. (*Id.*)
3. Where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it in good faith as collateral security for an antecedent debt of the

payee and indorser, without other consideration, occupies the position of a holder for value, and can recover thereon against the maker. The precedent debt is a sufficient consideration for the transfer, and no new consideration need be shown. (*Grocers' Bank* agt. *Penfield*, 69 *N. Y.*, 502.)

4. It is only where the note has been diverted from the purpose for which it was intended, by the payee, or where some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to enforce the same. (*Id.*)

BOND.

1. The respondent, a legatee for life in the rents, &c., of certain property devised by the will of appellant's testator, applied to the surrogate to be allowed to receive such part of the legacy as was necessary for her support, under the statute authorizing the surrogate to allow this to be done, upon it appearing to him that the assets in the hands of the executor exceed, by one-third, all debts, &c., then known, upon the execution of a satisfactory bond for the return of such portion, with interest, whenever required. A bond was tendered by the petitioners conditioned for the refunding of such moneys "as may be necessary to enable the executors to pay and discharge the debts of the testator, and the legacy having priority to hers."

Upon appeal from an order made by the surrogate directing the payment to the petitioner of a portion of her legacy, *held*, that, in order to give jurisdiction to the surrogate, it must appear that there is a surplus of assets by at least one-third; and that as, in this case, no proof on this point appeared to have been taken

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before the surrogate, the order was unauthorized.

That the bond did not conform to the statute, which required it to be conditioned for the refunding of the money *whenever required*, and not simply, if necessary for the payment of debts and prior legacies. (*Barnes* agt. *Barnes*, 18 *Hun*, 283.)

2. Under the provisions of chapter 848 of Laws of 1860 as amended by chapter 56 of the Laws of 1875, the failure of an assignee to give a bond does not invalidate the assignment, but the statute simply prohibits him from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond. (*Worthy* agt. *Benham*, 18 *Hun*, 176.)
3. A married woman is not liable upon a guardian's bond, executed by her as surety, when there is nothing expressed therein showing an intention to charge her separate estate. (*Gosman* agt. *Cruger*, 69 *N. Y.*, 87.)
4. The fact that the bond was executed in compliance with an order of the court, and that the law requires two sufficient sureties, does not make her liable. (*Id.*)
5. So also the making of an affidavit, on her part, that she possessed enough estate to make her a sufficient surety, does not incorporate into her contract an expression of intent to bind her separate estate. (*Id.*)
6. Suretyship for a guardian is not an exception to the rule that the contract of suretyship, if void at law, cannot be enforced in equity. (*Id.*)
7. In an action against the sureties upon a bond given by a special administrator or collector under the statute (3 *R. S.*, 77, *sec.* 43), a recital in the bond that the surro-

gate was about to issue letters, with proof that defendant's principal acted as special administrator, was called to account and was decreed to be in default as such, is sufficient without proof of the actual appointment and the issuing of letters to the special administrator; it is not necessary that the bond should state an actual appointment. (*Dayton* agt. *Johnson*, 69 *N. Y.*, 419.)

8. As to whether in such an action a decree of the surrogate adjudging defendant's principal to be in default and determining the amount thereof is competent evidence against the defendant to show a breach of the bond, it appearing by the decree that the citation upon which the proceedings before the surrogate were based was only served upon such principal by publication, *quare* (*MILLER* and *EARL*, JJ., holding that it was competent, that the service was sufficient to give the surrogate jurisdiction; *CHURCH*, Ch. J., *ALLEN* and *FOLGER*, JJ., that it was not, that service by publication gave the surrogate no jurisdiction). (*Id.*)
9. It is to be presumed in favor of the validity of proceedings appointing a special administrator that he took the oath required by law. (*Id.*)
10. In such an action upon due proof being made that upon the settlement of the accounts of defendant's principal, it appeared an amount of money remained in his hands which he had failed to pay over, the burden is upon the defendant to show that this has been paid over; the presumption is that it has not been, and to escape liability the presumption must be rebutted by proof that it has. (*Id.*)
11. A public administrator who has succeeded to the rights of a special administrator, and to whom the bond of the latter has been duly

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assigned for the purpose of prosecution (*sec. 65, chap. 480, Laws of 1887*), may bring an action as public administrator upon the bond. (*Id.*)

12. A purchaser of a bond and mortgage takes it subject to the equities between the original parties, and the assignor can give no better title than he has himself. (*Davis agt. Bechstein, 69 N. Y., 440.*)

13. It is only where the owner has by his own affirmative act conferred the apparent title and absolute ownership of a non-negotiable chose in action upon another, on the faith of which it has been purchased for value, that he is precluded from asserting his real title. (*Id.*)

14. Plaintiff and her husband executed to R. a bond and mortgage simply as an accommodation, to be used as collateral security for a loan he proposed effecting. R. failed to procure the loan, but sold the bond and mortgage to defendant B. In an action brought by plaintiff to have the bond and mortgage canceled, *held*, that R. having no authority to sell the bond and mortgage, conveyed no title to B., and that plaintiff was entitled to judgment declaring the bond and mortgage void as against her. (*Id.*)

15. Plaintiff's husband was not made a party to the action. At the opening of the trial the defendant's counsel objected to proceeding on the ground that the husband was a necessary party. *Held*, that the defect not having been taken by answer or demurrer, must be deemed to have been waived, and that there was no mistrial. (*Id.*)

BROKER.

1. In cases of exchange of property, real estate brokers, employed as middlemen to bring purchasers

together to enable them to make their own bargains, may charge commissions to both parties. They are not agents to buy or sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller. (*Balheimer agt. Reichardt, ante, 414.*)

BURDEN OF PROOF.

1. The burden of proving a survivorship rests upon the party who claims through it. (*Skinds agt. Ridgway, ante, 801.*)
2. Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively. A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill. (*Seymour agt. Cagger, 18 Hun, 29.*)
3. In an action against a trustee of a manufacturing corporation to enforce the statutory liability (*sec. 12, chap. 40, Laws of 1848*) imposed upon them, in case of a failure of the corporation, to make, file and publish an annual report, the *onus* is upon the plaintiff to prove the default; the statute being penal in its character, nothing can be presumed as against the defendant, and every fact necessary to establish his liability must be affirmatively proved; and this although it can only be done by proof of a negative. (*Whitney Arms Co., agt. Barlow, 68 N. Y., 84.*)
4. Accordingly *held*, where it appeared, in such an action, that a sufficient report was made and filed, that it was not incumbent upon the defendant to show the publication thereof. (*Id.*)
5. Where the defense of usury is interposed, the affirmative of the

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issue is upon the defendant, and where the case is tried by a referee and the transaction is equivocal, defendant must give evidence of facts showing the alleged illegal intent, and have the fact found by the referee; it cannot be adjudged in the first instance by this court on appeal. (*Haughtwout agt. Garrison*, 69 N. Y., 839.)

6. In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a *bona fide* holder for value; this presumption is not repelled merely by proof that the paper as between the immediate parties was without consideration, and was made, indorsed or accepted by one for the sole accommodation of the other. (*Harger agt. Worral*, 69 N. Y., 870.)
7. Where, therefore, in an action by an indorsee before maturity against the acceptors of a bill, the defense was that the acceptance was without consideration and solely for the accommodation of the drawer, and that it was discounted by plaintiffs for the drawer at a usurious rate of interest, *held*, that the burden was upon defendants to show the amount paid by plaintiffs for the bill, and in the absence of any evidence upon the subject, that the plaintiffs were entitled to recover. (*Id.*)
8. In an action on the bond of a special administrator upon due proof being made that upon the settlement of the accounts of defendant's principal, it appeared an amount of money remained in his hands which he had failed to pay over, the burden is upon the defendant to show that this has been paid over; the presumption is that it has not been, and to escape liability the presumption must be rebutted by proof that it has. (*Dayton agt. Johnson*, 65 N. Y., 419.)

CITY OF TROY.

1. Under the act to establish and maintain a police force in the city of Troy (*Laws of 1870, chapter 520, sec. 1*), no member of said force can be removed except upon "written charges" and a public hearing and examination by the board of commissioners after due notice. (*People ex rel. Seery agt. Police Commissioners*, ante, 454.)
2. Where a member, upon no specific charges, though asking for a copy of charges against him, and for time to procure testimony, "was summarily dismissed" by the board of police commissioners, on oral charges for neglect of duty, and inefficiency in the discharge thereof, * * * on oral reports touching said neglect of duty and inefficiency, made by the superintendent and captains of the police force to said board:
Held, that the action of the board of police commissioners, in removing such member, was illegal, and must be reversed. (*Id.*)
3. Nor is such removal legal and valid under the act of 1876 (*Laws of 1876, chap. 30, sec. 7*), which act is amendatory of that of 1870. Under the provisions of this act there must be a trial. (*Id.*)
4. After-occurring events cannot legitimately be made a part of a return to a *certiorari* brought to review certain determinations and conclusions of a board of police commissioners as to the dismissal of a member of the police force. The return should only set out the proceedings sought to be reviewed. Any statement by the commissioners, as to what the relator did after his pretended removal, has nothing to do with the question sought to be reviewed. (*Id.*)

CERTIFICATE.

1. The provisions of the statutes in relation to the formation of cor-

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- porations (*Laws of 1848, chap. 40; Laws of 1866, chap. 709*) requiring the "duplicate certificate" to be filed in the office of the secretary of state is directory, merely, and not mandatory nor essential to the validity of the corporation. (*Rassebeck et al. agt. Desterreicher et al., ante, 516.*)
2. The certificate having been filed in the office of the clerk, it is immaterial in any action (not brought by the state against the corporation to prohibit its exercise of corporate powers) to inquire whether the duplicate of such certificate has been filed in the office of the secretary of state. (*Id.*)
 3. The production of a copy of the certificate filed with the county clerk, which copy is testified by him, being made evidence of the incorporation by the statute, is sufficient proof of corporate existence and sufficient answer to all allegations of non-incorporation, except in a direct proceeding by the state to annul the franchise. (*Id.*)
 4. Upon a common law *certiorari* costs are not allowable. (*People ex rel. agt. McDonald, 69 N. Y., 362.*)
 5. Upon the review of proceedings by a common law *certiorari*, only errors in law affecting materially the rights of the parties may be corrected. The evidence may be examined to determine whether there is any competent proof to justify the adjudication made; but questions of fact as to which there is conflicting evidence or when conflicting inferences may be drawn from the facts or in matters of judgment or discretion, in a case justifying their exercise, cannot be reviewed. (*People ex rel. agt. Board Police and Excise, 69 N. Y., 408.*)

CHARTER-PARTY.

- CERTIORARI.
1. A common-law *certiorari* only lies to inferior tribunals and to officers exercising judicial powers; the title to office or the acts of an officer whose duties are strictly ministerial cannot be inquired into, examined or reviewed upon a writ directed to him. (*People ex rel. agt. Walter, 68 N. Y., 403.*)
 2. The fact that a public agent exercises judgment and discretion in the performance of his duties, does not make his actions or powers judicial in their character. (*Id.*)
 3. A writ of *certiorari* directed to different officers having no joint or common duties, but acting each independently of the other, is bad for multifariousness. (*Id.*)
 1. The defendants executed a charter-party to plaintiffs, which contained an agreement that the vessel was seaworthy. The defendants were not the owners of the vessel, but had chartered her from the owners:
Held, that for damages resulting from a breach of such covenant or agreement the defendants are liable to the plaintiffs. (*Swift et al. agt. Tross et al., ante, 255.*)
 2. The fact that the plaintiffs knew that the defendants had chartered the vessel from the owners does not alter the status of the parties or release the defendants from the obligations which, by their charter-party, they voluntarily assumed. (*Id.*)
 3. Although the charter-party executed by the defendants states that the defendants' contract was a recharter, it is not merely an equitable assignment of the first, but it is an independent contract; and while it may have referred to the source of the defendants' right to make such a contract, and to

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their special title to the use of the vessel, the defendants cannot avoid their liability for that reason upon a failure to fulfill the covenants and conditions of their contract. (*Id.*)

4. The fact that the plaintiffs have brought an action against the owner of the vessel to recover the same damages which form the subject of this action, without also alleging that such an action had been prosecuted to judgment against the owner, and that the judgment had been paid, is not a good defense. (*Id.*)

5. Until the alleged damages have been received from, or paid by, the owner it is no defense to this case that an action has been commenced against him. (*Id.*)

CHATTEL MORTGAGE.

1. Upon the loan of money to be secured by a chattel mortgage on copyrights, music plates, &c., &c., a printing contract between the parties being made at the same time, by which it was agreed that the mortgagees might print music from the plates of the mortgagor, the expense of printing and materials to be borne by the mortgagees, the profits from the music so printed to be divided equally between the parties, it appearing that the loan of the money and the printing contract were part and parcel of one general arrangement in the beginning, but were in fact made afterwards divisible, and after the mortgage was executed, and before the printing contract was made, the option was given to the mortgagors to give up the printing agreement, but they desired it to be made.

Held, that the transaction was not usurious.

Clark agt. *Sheehan* (47 N. Y., 188) applied. (*Hall* agt. *Dillon*, ante, 19.)

2. Where a mortgagee of chattels upon a public sale makes reasonable and fair efforts to sell the property for a good price, and through the acts, statements and notices of the mortgagor at the time of sale, the effect of which is to discourage bidding, and the same does not bring a full price, a court of equity will not set aside the sale on the application of the mortgagor. (*Id.*)

3. The effect of a public sale, upon due notice, under a chattel mortgage is to cut off the equity of redemption of a mortgagor. (*Id.*)

4. A mortgagee, under a chattel mortgage, may himself become a purchaser on a public sale of the chattels. (*Id.*)

5. In order to redeem under a chattel mortgage the mortgagor must in good faith pay or tender the whole mortgage debt, and *that before suit brought*. Where the plaintiff upon a trial is not found to have just ground for equitable relief, the action cannot be held to adjust rights and claims between co-defendants, not related to the cause of action set up in the complaint. (*Id.*)

6. Upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title of the property so sold is to be implied against the mortgagee. (*Sheppard* agt. *Earles*, 18 Hun, 651.)

7. An action in equity lies to foreclose a chattel mortgage. (*Briggs* agt. *Oliver*, 68 N. Y., 336.)

8. Defendant O. purchased certain property subject to a chattel mortgage thereon held by plaintiff, which O. assumed and agreed to pay. O. sold the property to de-

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fendants V. and P., with warranty of title and covenant against incumbrancers. V. and P., however, had notice of the existence of the mortgage. O. sued V. and P. for the purchase-money and obtained judgment. Plaintiff thereupon brought this action against all the parties, including the mortgagors, asking that the mortgage be paid by V. and P. out of the balance of the purchase-money, the amount paid to be allowed on the judgment, and that O. be restrained from enforcing the judgment. None of the defendants appeared except O. By the consent of plaintiff and O., and pursuant to an order in said action by O. against V. and P., they paid into court \$500 of the amount of the judgment to abide the order of the court in this action. *Held*, that as no demand of judgment of foreclosure or relief looking to that end was made in the complaint no such judgment could be granted as against V. and P., they not having appeared in the action (*Codes, sec. 275*); that the agreement and order requiring the payment of the money into court could not be treated as an agreement of all the parties that the fund should be a substitute for the mortgaged property, as if it had been sold on the mortgage and the proceeds brought in for distribution; but that the money was deposited to secure plaintiff in case he established a lien upon the judgment; that the action then stood as one brought by a creditor before judgment to reach the equitable assets of the debtors whose insolvency had not been shown, and as such could not be sustained. (*Id.*)

9. It is not necessary that a chattel mortgage shall declare that the defeasible title of the mortgagee will become absolute on failure of the mortgagor to pay the sum secured, or any part thereof, when it becomes due; this result follows as an incident to the relation

of the parties. (*Bragelman agt. Dauc, 69 N. Y., 69.*)

10. If the mortgagor fails to pay according to the terms of his undertaking, his rights at law are terminated, but there remains to him an equity of redemption liable to be extinguished by a valid sale of the property by the mortgagee. (*Id.*)
11. Upon the dissolution of a partnership between the parties, plaintiff executed to defendant a bill of sale of his interest in the stock of goods and effects of the firm, and the parties signed an agreement by which defendant employed plaintiff as his agent to sell the goods, plaintiff to retain the net profits for his services. Defendant also agreed to sell the property to plaintiff at a time and for a sum specified, which plaintiff agreed to pay in installments. Upon failure of plaintiff to pay the first installment, defendant took possession of the goods, sold a portion and retained a portion. In an action by plaintiff for an accounting, &c., *held*, that the instruments executed by the parties constituted a chattel mortgage from plaintiff to defendant; but that a judgment charging defendant with the value of all the property taken by him, as for a conversion, and deducting therefrom the amount of his claim and expenses was error; that in consequence of plaintiff's default, defendant became the owner with the right to possession, and while if on the accounting it appeared that plaintiff had received enough from the goods sold to pay his claim, the goods remaining should be adjudged to belong to defendant, yet plaintiff could not be compelled to take pay for them. A mortgagee, in an action to redeem, cannot be compelled to become a purchaser of a portion of the mortgaged property at a valuation fixed by the court. (*Id.*)

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CLAIM AND DELIVERY OF
PERSONAL PROPERTY.

1. It is not essential to the validity of an undertaking given by the plaintiff in an action to recover possession of personal property in apparent conformity with the provisions of the Code in reference thereto (*sec. 209*), that the undertaking be delivered to the sheriff as required by said provision, or that the statutory proceedings be taken and the undertaking used to accomplish the purpose for which the statute requires it to be given. (*Harrison agt. Wilkin, 69 N. Y., 412.*)
2. The parties to the action may waive the formalities of the statutory proceedings, and in such case the sureties to the undertaking are bound by the waiver and are estopped from questioning the recitals in the undertaking, and this although they had no knowledge of the facts that the proceedings were not to be taken and the undertaking used in the manner prescribed by the statute. (*Id.*)
8. Accordingly *held*, where in pursuance of an arrangement between two parties, one of whom had in its possession personal property claimed by the other, an action was brought by the former in the form of an action to recover possession of the property, and an undertaking was given, entitled in the action, reciting that plaintiff claimed delivery of the property, and undertaking to prosecute the action and to return the property, if return should be adjudged, &c., that the sureties to the undertaking were estopped, in an action thereon, from questioning the recital, although they had no knowledge that the defendants in the replevin suit were not in possession of the property, or that the statutory proceedings were not to be had, or the undertaking used to obtain delivery. (*Id.*)

CLOUD UPON TITLE.

See EQUITABLE ACTIONS.

The Mayor agt. Union Ferry Company, ante, 138.

The Mayor agt. North Shore Staten Island Ferry Company, ante, 154.

CODE OF PROCEDURE.

1. Sections 1, 2, 8 — An application by an imprisoned debtor for his discharge under part 2, chapter 5, title 1, article 6, of the Revised Statutes, is a special proceeding as defined by these sections, and an order of special term therein discharging the petitioner is a final order, and is appealable to the general term. (*Matter of Brady, 69 N. Y., 215.*)
2. Section 11 — An order of the supreme court general term requiring the commissioners of highways to build or repair a bridge as provided by the act of 1857 (*Laws of 1857, chap. 639*), is a final order affecting a substantial right in a special proceeding and is appealable to the court of appeals. (*In re Freeholders, 68 N. Y., 376.*)
3. Section 135 — An allegation in the complaint that the plaintiffs had been unable to effect service of a summons upon Waring, sr., and that he was keeping himself concealed out of the state to avoid service of summons, fails to show that he was, at the time of the commencement of this action, a non-resident of this state, having no property within this state, and therefore under the Code and the rules of the court, not liable to be served by publication or by substituted service. Such an allegation brings the defendant within the second subdivision of section 135 of the Code of Procedure, which provides for service by publication. (*Sloan et al. agt. Waring et al., ante, 62.*)

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4. Section 185—What necessary to complete substantial service under this section. Effect of mailing and addressing a copy of the summons and complaint to defendant at a different place from that stated in the order. (*Smith agt. Wells et al.*, 69 N. Y., 600.)
5. Section 167—Even assuming that causes of action, arising under the act of 1848 (*Laws of 1848, chap. 40*), against the trustees of a manufacturing corporation for an omission to file an annual report (*sec. 12*), and for making and filing a false report (*sec. 15*) may be united in one action; in order to justify such union, each of the causes of action must affect all the parties. (*Bonnell agt. Grinwood et al.*, 68 N. Y., 294.)
6. Section 209—Under this section it is not essential to the validity of an undertaking given by the plaintiff in an action to recover possession of personal property, that the undertaking be delivered to the sheriff as required by said provision, or that the statutory proceedings be taken and the undertaking used to accomplish the purpose for which the statute requires it to be given. The formalities of the statutory provision may be waived by the parties to the action and the sureties to the undertaking are bound by the waiver. (*Harrison agt. Wilkin*, 69 N. Y., 412.)
7. Section 227—It is not necessary, in order to give jurisdiction to issue an attachment under this section, that the affidavit should state specifically that a summons has been issued or served; a statement that an action has been commenced is sufficient. To authorize the issuing of an attachment it is not necessary that a summons shall have been served; for that purpose "an action shall be deemed commenced when the summons is issued." (*Wallace & Sons agt. Castle et al.*, 68 N. Y., 370.)
8. Section 235—*It seems* that in order to make a valid levy by virtue of the attachment when the sheriff himself holds the execution, it is not necessary to serve notice of the property levied on, as required by this section of the Code. (*Whele agt. Connor*, 69 N. Y., 546.)
9. Section 248—This section of the Code, as amended in 1865, only allows poundage in case of a sale by virtue of the attachment before judgment; and then only in case a settlement has been had or a judgment recovered and collected in whole or in part, in which case poundage is to be estimated on the amount collected, or "the amount at which settlement is made." A sheriff is not entitled to poundage in case of a subsequent settlement of plaintiff's claim before any sale of the property by him. (*German Amer. Bk. agt. Morris Run Coal Co.*, 68 N. Y., 585.)
10. Section 271—Where a question of fact arising upon a motion is referred, as authorized by this section, the court has no authority to allow disbursements in addition to ten dollars cost of motion. (*Concklin et al. agt. Taylor*, 68 N. Y., 221.)
11. Section 275—In an equitable action to foreclose a chattel mortgage where no demand of judgment of foreclosure or relief looking to that end was made in the complaint, no such judgment can be granted as against a party not having appeared in the action. (*Briggs agt. Oliver*, 68 N. Y., 336.)
12. Sections 279, 280, 281, 282—When judgment roll will be presumed to be lost or destroyed, so as to allow secondary evidence to be given of its contents. (*Mandeville agt. Reynolds*, 68 N. Y., 528.)
13. Section 288—order of arrest—neglect of party procuring, to enter judgment when it is in his power so to do—discharge by order

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- under — vacating said order — effect of. (*See Schelly agt. Zink, 18 Hun, 538.*)
14. In order to authorize the making of an order before execution returned requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply his property to the satisfaction of the judgment, and has been refused by him. (*First National Bank agt. Wilson, 18 Hun, 232.*)
15. Section 303 — The provision of this section has no application to a contract in relation to the services of an attorney already rendered, but has reference only to prospective services. (*Whitehead agt. Kennedy, 69 N. Y., 462.*)
16. Section 311 — The disbursements upon a motion by an assignee of a judgment to vacate a satisfaction thereof, executed by the judgment creditor after assignment, are not costs in an interlocutory proceeding, within this section of the Code, and no provision is made by the Code for their allowance. (*Concklin et al. agt. Taylor, 68 N. Y., 221.*)
17. Section 330 — The provision of this section does not authorize the general term where it has decided that a judgment in favor of plaintiff in an action upon contract for services, or upon a *quantum meruit*, is erroneous, to determine upon the examination of conflicting evidence what sum plaintiff ought to recover, and render judgment therefor; it should, in such cases, award a new trial. (*Whitehead agt. Kennedy, 69 N. Y., 462.*)
18. Section 339 — Appeal by executor — security on — failure to apply for limitation of amount of, under this section of the Code — presumption of assets arising from. (*See Yates agt. Burch, 18 Hun, 622.*)
19. Section 348 — Meaning of "adverse party" as used in. (*See Yates agt. Burch, 18 Hun, 622.*)
20. Section 399 — Where A the payee of a note, indorsed it to B and B indorsed and delivered it to C, B having died before action brought by C, *held*, that C was an assignee of B within the meaning of this section, and A was a person "from, through, or under whom" C derived title within the meaning of this section, and A, therefore not a competent witness to establish the defense of usury on the discount of the note by B but that he would have been a competent witness under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. (*Richardson agt. Warner, 18 Hun, 18.*)
21. Section 399 — Commented on and a nice distinction drawn between it and section 829 of the Code of Civil Procedure. (*Markell agt. Benson, ante, 360.*)
22. Section 399 — What questions are indispensable under this section. (*Chadwick agt. Former et al., 69 N. Y., 404.*)
23. Section 449 — One in actual possession of land for three years may maintain an action under this section to compel the determination thereto. (*Ford agt. Belmont et al., 69 N. Y., 567.*)

CODE OF CIVIL PROCEDURE.

1. Sections 149 — 575 — Defendants arrested in an action to recover chattels wrongfully concealed or

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- disposed of, may, under the new Code, either give an undertaking to pay any judgment finally recovered, or be admitted to the liberties of the jail upon the ordinary limit bond. (*Levy et al. agt. Kaim et al., ante, 136.*)
2. Section 417—The provisions of this section of the Code of Civil Procedure as to what the summons must contain are *mandatory*. Where a summons is served in an action in the supreme court without naming the county where the plaintiff desires the trial to be had it will be set aside, on motion, as irregular and void. (*Osborn agt. McCloskey, ante, 345.*)
3. Section 435—Proper case for substituted service. The proof necessary under this section. What is "*satisfactory proof*," fully discussed. (*McCarthy agt. McCarthy, ante, 418.*)
4. Section 511—Severance of causes of action under—offer to allow judgment to be taken for one of several claims—effect of, on right to sever. (*See Bradbury agt. Winterbottom, 13 Hun, 536.*)
5. Section 558—Facts independent of the cause of action, entitling a party to an order of arrest, should be stated on affidavit, and should not be stated in the complaint. The only true construction to be put upon the last clause of section 558 of the Code of Civil Procedure is, that if the complaint served after obtaining the order of arrest should be for a case not mentioned in sections 549 or 550, but a case or cause of action wherein no provision is made for an arrest, then the moving party would be entitled to an order setting aside the order of arrest. It was not designed to extend or alter the rule that had been established under the old Code (*Following Williams agt. Norton, 54 How., 509, and Thompson et al. agt. Friedberg, id., 519; and is adverse to Bovey National Bank agt. Duryea, id., 450.*) (*Mather agt. Hannaur, ante, 1.*)
6. Section 558—To justify vacating an order of arrest under the last clause of this section, it must *affirmatively* appear by the complaint that the cause of action is such that in *no event* could the defendant be arrested within sections 449 or 450 (*See, to same effect, Williams agt. Norton, 54 How., 509; Thompson et al. agt. Friedberg, 54 id., 519; Mather agt. Hannaur, ante, 1; contra, Bovey National Bank agt. Duryea, 54 How., 450.*) (*Sloan et al. agt. Livermore et al., ante, 85.*)
7. Section 558—Facts upon which an order of arrest is based, which are extrinsic to the cause of action, need not be set forth in the complaint (*Reversing S. C., 54 How., 450.*) (*Bovey National Bank agt. Duryea, ante, 88.*)
8. Sections 559-562—The failure to serve a copy of the undertaking upon the defendant at the time of the arrest (as would seem to be required by these sections), is only an irregularity, and does not entitle a defendant to his discharge. (*Mather agt. Hannaur, ante, 1.*)
9. Section 561—That the order of arrest was not signed by the attorney, as required by this section, is not fatal to the order of arrest. Although it is an irregularity which should not be overlooked or omitted in practice, such omission may be supplied by amendment under sections 723, 724. Whether the name of the attorney upon the back of the order, and not at the end or face of it, would be a sufficient compliance with the provision of section 561, *quære.* (*Id.*)
10. Sections 603, 604—What is not a proper case for an injunction under these sections. (*Clinton*

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Liberal Institute et al. agt. Fletcher et al., ante, 431.)

11. Sections 682-683 — On motion by judgment creditor to vacate attachment granted prior to recovery of judgment, the plaintiff may offer new proof, by affidavits, sustaining the grounds for attachment recited in the warrant. (*Steuben County Bank agt. Alberger, ante, 481.*)
12. Section 772 — An order authorizing a substituted or constructive service of a summons is not an order granting a provisional remedy, within the meaning of this section of the Code of Civil Procedure. (*McCarthy agt. McCarthy, 13 Hun, 579.*)
13. Section 829 — Under what circumstances a party will be allowed to be examined in his own behalf. Section 399 of the old Code commented on and a nice distinction drawn between that section and this. (*Markell agt. Benson, ante, 860.*)
14. Section 829 — Where A the payee of a note, indorsed it to B who discounted it at a usurious rate, and subsequently indorsed and delivered it to C and B died before action brought by C held, that while A, under section 899 of the old Code, was not a competent witness to prove the usury, as being a person "from, through, or under whom" C derived title within the meaning of that section, yet he was competent under section 829 of the Code of Civil Procedure, as thereby the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. (*Richardson agt. Warner, 13 Hun, 13.*)
15. Sections 870 and 872 — The examination of an adverse party before trial, provided for by these sections, is not a mere substitute for the former remedy by bill of discovery. They provide also for perpetuating testimony. Sufficiency of affidavit on application for order. (*Hynes agt. McDermott, ante, 259.*)
16. Section 1016 — The requirement of section 1016 of the Code of Civil Procedure, that "a referee, before proceeding to hear the testimony, must be sworn faithfully and fairly to try the issues, &c., unless the oath be expressly waived by written stipulation or orally, in which latter case the waiver must be entered in the referee's minutes," is directory merely, and may be waived by the acts and acquiescence of the parties to the proceeding.
Where the defendant and his attorney, both learned in the law, and with knowledge of the provision of this section as to the oath of the referee, voluntarily, and without objection, conduct the defense to an unsuccessful issue, which was followed by an acquiescence in the validity of the proceedings, as shown by an application for additional time to file exceptions to the report, and opposition to the motion for an extra allowance:
Held, that the defendant had waived his right to the statutory requirement as to the oath of the referee (*See The Exchange Fire Insurance Co. agt. Early, 54 How., 379; McGowan agt. Newman, id., 458.*) (*Nason agt. Luddington, ante, 842.*)
17. Section 1019 — The submission to the referee was December 26, 1877. On February 22, 1878, the referee prepared, finished and signed his report, and on the twenty-third notified the attorney for the defendant that he had made his report for defendant and had left the same on his (the referee's) table for the defendant's attorney, and at the same time he stated to defendant's attorney the amount of his fees. On the twenty-third or twenty-fifth of February the defendant's attorney

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informed the plaintiff's attorney that the referee had made his report for defendant and that the referee was about to prepare an opinion which he would serve with a copy of the report:

Held, that the facts shown in the case and the notification made by the referee to defendant's attorney was, in substance and effect, a *delivery* of the report to the attorney within the provisions of this section of the Code of Civil Procedure. (*Quackenbush* agt. *Johnson*, ante, 94.)

18. Section 1847—Appeal from order overruling or sustaining a demurrer to the whole or a portion of a pleading—full costs allowed on. (*See Van Gelder* agt. *Van Gelder*, 11 *Hun*, 118.)

19. Section 1849—Appeal from an order overruling or sustaining a demurrer to the whole or a portion of a pleading—full costs are allowed. (*Id.*)

COMMISSION TO TAKE TESTIMONY.

1. An objection to evidence, taken under a commission, that the commission was not executed by the person intended, should be raised by motion to suppress where the party has an opportunity so to do; if not so raised it will be deemed to have been waived; it cannot be raised, upon the trial, where the party had knowledge of the fact a sufficient time before the trial to enable him to make the motion, (*Newton* agt. *Porter*, 69 *N. Y.*, 183.)

COMMITMENT.

1. The jurisdiction of inferior courts and magistrates must affirmatively appear. (*Matter of Travis*, ante, 347.)

2. A statement that any act has been regularly or duly done is not suffi-

cient; the preliminary steps must be stated so that it can be seen that all was due and regular. The liberty of the citizen cannot depend upon the declaration of the magistrate that he has done all that the law requires, but upon the actual performance of those duties. (*Id.*)

3. In the absence of any proof showing a valid complaint, the issue of a warrant, the arrest of the prisoner, the bringing her before the magistrate, and the proceedings upon such arraignment, the prisoner cannot be detained upon the warrant which is returned as the sole cause and right of detention. (*Id.*)

4. On *habeas corpus* to inquire into the imprisonment of a party for failure to give security as required by the act in relation to disorderly persons (2 *R. S.* [6th ed.], page 893) a commitment issued by a police justice which simply states that E. T. "has been duly convicted before me," &c., without stating any facts showing the conviction was duly had, is insufficient and the prisoner must be discharged. (*Id.*)

5. The magistrate is required "to make up, sign and file in the county clerk's office a record of the conviction of such offender as a disorderly person, specifying generally the nature and circumstances of the offense." (*Id.*)

6. A record of conviction in such case which does not show the arraignment of the prisoner, her confession or denial of the charge, the examination of witnesses in her presence, the nature and character of the testimony and above all the circumstances of the offense, is defective and does not show that there has been a regular conviction as the warrant of commitment recites. (*Id.*)

7. It is no compliance with the stat-

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ute for the magistrate to use the language of the act and say that E. T. is a disorderly person, "or that she was and is a common prostitute," for that is a simple conclusion depending upon "the circumstances" which are not detailed. (*Id.*)

8. In describing the offense a mere compliance with the terms of the statute will not suffice. The *particular circumstances* which leads to the opinion of the magistrate must be set forth, and not the mere result or conclusion from them. (*Id.*)

COMPLAINT.

1. The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, must, in substance, state the representations and aver their falsity and that they were made with intent to deceive the plaintiff and induce him to make the purchase or trade, and that they did induce such trade to the plaintiff's injury. (*Brown* agt. *Brockett*, ante, 83.)

2. Where the complaint averred that the defendant sold and delivered to the plaintiff a quantity of beef at and for a price agreed upon between the parties; that the plaintiff paid to the defendant the price agreed upon; that at the time of such sale the defendant represented and warranted that said beef was good, merchantable and was that of an ox; that the said beef was not good, merchantable beef, nor was it that of an ox, but on the contrary was that of an old bull and plaintiff verily believes was diseased and unfit for any use at the time of such sale; that the fact that such beef was not fit to sell or use was well known to the defendant at the time of such sale; that the plaintiff used a small portion of said beef in his family and was made sick

by the use thereof, and that the whole of said beef was utterly worthless; that by reason of the premises the plaintiff was damaged, &c., &c.:

Held, that the complaint is clear and explicit and sets out a warranty and claims and alleges a breach of the same and cannot be regarded, in form and substance, as one for fraud or deceit.

Held, further, that plaintiff could not be imprisoned on execution against the body for costs recovered by defendant in such action. (*Id.*)

3. Where, in an action to set aside a deed as invalid, the relief depends upon facts extrinsic thereto such facts must be set up in the complaint. (*The Mayor* agt. *Union Ferry Co.*, ante, 138.)

See ARREST.

Mather agt. *Hannaur*, ante, 1.

See PLEADING.

Robinson agt. *Hatch*, ante, 55.
Victory Webb, &c., *Manufacturing Co.* agt. *Beecher et al.*, ante, 193.

See CORPORATIONS.

Birmingham National Bank agt. *Cock*, ante, 222.
Hand and others agt. *Atlantic National Bank*, ante, 231.

See MECHANICS' LIEN.

Watrous agt. *Elmendorf et al.*, ante, 461.

CONSOLIDATION OF ACTIONS.

1. The statute authorizing consolidation of suits, *it seems*, does not relate solely to actions at law; suits in equity (i. e. foreclosure suits) may also be consolidated. (*Eleventh Ward Savings Bank* agt. *Hay*, ante, 438.)

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2. Where the motion for consolidation has been delayed until the causes are called for trial, the defendant will be deemed to have been guilty of such laches as to deprive him of his claim for this relief. (*Id.*)
3. If a defendant wishes to have the suits consolidated, he should move before they are brought to trial, so that the other party may have an opportunity to read affidavits and be heard as upon an ordinary motion before trial. (*Id.*)
4. The granting or withholding an order for the consolidation of actions, rests entirely in the discretion of the court in each particular case. (*Id.*)

CONSTRUCTIVE NOTICE.

1. The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case is that the occupant is holding subject to the mortgagee. (*Mutual Life Insurance Co. agt. Wilcox, ante, 48.*)

CONTEMPT.

1. Upon the trial of this action, brought to foreclose a bond and mortgage, in which the defense was payment, the plaintiff having been subpoenaed to produce the bond was called as a witness and asked if he had it, to which he said he did not have it; that he did not have it in his possession when subpoenaed. The court then stated that the question was, whether he had control of it. After about an hour had been occupied by counsel in his efforts to find out where the bond was, the counsel for the plaintiff stated that he had it in his pocket, and being asked by the court if he would produce it said that he

declined to do so at present, whereupon the justice ordered the complaint to be stricken out. *Held*, that this was proper. (*Shelp agt. Morrison, 18 Hun, 110.*)

2. Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue. (*Cochran agt. Ingersoll, 18 Hun, 328.*)
3. The power to punish as for a contempt the disobedience of an order granted by a county judge in proceedings supplementary to execution issued upon a judgment in the supreme court, requiring the judgment debtor to appear and answer concerning his property, does not vest exclusively in the county judge; the supreme court has concurrent jurisdiction and power to punish. (*Tremain agt. Richardson, 68 N. Y., 617.*)
4. In an action brought by plaintiffs, who compose the firm of "Devlin & Co.," to restrain defendant from using their firm name, an injunction order was granted restraining defendant from displaying upon signs, &c., said firm name, and confining him to the use of his own "proper Christian and surname conjoined," without devices which may tend "to mislead or induce the public to believe or suppose that he is the plaintiffs." Defendant thereafter put out a sign, upon which was "Devlin's clothing;" over the word "Devlin's," were defendant's initials "J. S.," with the number of his store "826" on each side of the initials. *Held*, that the facts justified a finding that the words and letters were so

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- arranged as to deceive, and were so intended; and that an order adjudging defendant guilty of contempt was proper. (*Devlin* agt. *Devlin*, 69 N. Y., 212.)
5. Surrogate's courts, being courts of limited jurisdiction, in proceedings to punish for contempt, are confined to the powers expressly conferred by statute; and not being courts of record, the provisions of the Revised Statutes in regard to the powers of courts of record in such proceedings to enforce civil remedies have no application to them, save so far as applied by express statutory enactment. (*In re Watson* agt. *Nelson*, 69 N. Y., 536.)
 6. Disobedience of a surrogate's decree or order directing the payment of money generally, not out of a specific fund, by an executor to the persons interested in the estate, is not a contempt for which a fine can be imposed and the party committed to close custody, as for a criminal contempt. (*Id.*)
 7. It seems that, for the enforcement of their orders and decrees directing the payment of money, the only proceedings against the person which can be taken by surrogate's courts are those authorized to be taken in the late court of chancery in analogous cases, *i. e.*, if a final decree, an execution against the person; if an interlocutory order, a precept of commitment—in both which cases the party is entitled to the benefit of the jail liberties. (*Id.*)
 8. The provisions of the act of 1837 concerning executors, &c. (*sec. 67, chap. 460, Laws of 1837*), which renders certain provisions of the Revised Statutes applicable to attachments issued by surrogates, does not enlarge the powers of surrogates in regard to the cases in which they may punish for contempt. (*Id.*)
 9. An executor committed to the county jail by virtue of a warrant of commitment issued by a surrogate upon an order adjudging said executor in contempt for disobedience of a final decree, directing him to pay over a sum specified to various parties named, was discharged by order in proceedings on *habeas corpus*. The general term, on writ of *certiorari*, affirmed the proceedings. *Held*, that one of the parties named in the surrogate's decree as entitled to a portion of the sum, who was not named in the writ of *certiorari*, had no such standing in the proceedings as to entitle her to appeal to this court. (*Id.*)

CONTRACT.

1. In cases of exchange of property, real estate brokers, employed as middlemen to bring purchasers together to enable them to make their own bargains, may charge commissions to both parties. They are not agents to buy or sell, and not within the rule which prohibits their acting without consent as agent for both buyer and seller. (*Balheimer* agt. *Reichardt*, *ante*, 414.)
2. One who has been induced, by fraud or misrepresentation, to enter into a contract, may, after the discovery of the alleged fraud and with full knowledge of the facts, affirm the contract and waive the fraud. (*Id.*)
3. Where the fact was established that after defendant had been informed of the alleged misrepresentations, and had refused to carry out the contract, he, nevertheless, applied to, and obtained from plaintiff an extension of the time of performance, on his (defendant's) promise to execute it. This was on the day preceding the day first fixed in contract for the performance, and on that day a paper was executed by both par-

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ties, extending the time five days, and agreeing that the contract should be closed on that day.

Held, that this paper should be regarded as a positive affirmation of the contract by the defendant, after he had become possessed of a knowledge of all the facts, which he now claims entitle him to a rescission or cancellation of the contract, and that plaintiff is entitled to a decree for specific performance. (*Id.*)

4. Where an action is brought to set aside a contract, on the ground that the plaintiff was induced to enter into it through the fraud of the defendant, it is not necessary that the complaint should contain an offer to restore what has been received under it. (*Hay* agt. *Hay*, 13 Hun, 315.)
5. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary. (*Id.*)

CONTRIBUTORY NEGLIGENCE.

1. This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. At Amboy the defendant had four tracks, numbered from the south 1, 2, 3 and 4; 1 and 2 being for passenger, and 3 and 4 for freight cars. Upon land adjoining the southerly tracks owned by the defendant, it had erected a station and a plank sidewalk, leading westerly about 100 feet to a highway. At the time of the accident the plank walk was so obstructed with snow as to be impassable. East of the highway cattle guards had been constructed, the southerly two being planked over and the northerly two left open, but the two latter were, at the time of the accident, so filled and

covered over with snow, as to be entirely concealed.

The plaintiff's intestate who lived on the aforesaid highway, a few rods northerly from the crossing, arrived at Amboy in the morning with two children, one about three years old and the other an infant, and was assisted from the cars on the southerly side of track No. 2; she started to walk westerly and diagonally across the tracks toward the highway, the shortest route to her house; a gravel train was approaching on track No. 3; after she had walked about fifty feet she fell into the cattle guard which was concealed by the snow, and before she could extricate herself she was run over by the gravel train and killed. If she had not so fallen she would have had time enough to cross the track before the train would have reached that point. The justice at the circuit granted a nonsuit. *Held*, that this was error and that the case should have been submitted to the jury. (*Hoffman* agt. *N. Y. Central and H. R. R. Co.*, 13 Hun, 580.)

2. At Kirkville, on the defendant's road, the station and depot are on the north side of the track, and passengers generally get off on the north side of the cars. Along the south side of the track, and very close to it, is a ditch. The plaintiff, a resident of the place and well acquainted with the situation of the depot, attempted to get off the train, on the south side, at a point where the track was intersected by a highway running at right angles with it, at a time when the train had stopped or was running very slowly. The conductor, who was on the north side of the train, not seeing the plaintiff, who was on the lowest step of the car, signalled the engineer to go on, and by his so doing the plaintiff was thrown off and injured. It was proved that when the cars stopped on the highway it was not

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unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village.

Held, that it was error for the court to charge, as matter of law, that the attempt to alight on the southerly side of the train did not constitute contributory negligence; that whether it did or not should have been submitted to the jury. (*Plopper* agt. *N. Y. C. and H. R. R. Co.*, 13 *Hun.*, 625.)

3. One Barringer was driving, plaintiff's intestate and himself being in a one-horse wagon, on a highway crossing defendant's railroad. While at a safe distance therefrom they became aware of the approach of an engine, and Barringer at once endeavored to stop the horse and succeeded in checking him, he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law.

In an action to recover damages for the killing of plaintiff's intestate, *held*, that although negligence on the part of Barringer could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to, or cause the accident the plaintiff could not recover. (*Coogrove* agt. *N. Y. Central and H. R. R. Co.*, 13 *Hun.*, 329.)

COPYRIGHT.

1. The supreme court of this state has jurisdiction and authority to grant an injunction, at the suit of a resident plaintiff, against a non-resident defendant, restraining him from performing or exhibiting a drama, in a foreign state, in violation of plaintiffs' rights, where the summons and the injunction order are served on defendant, while he is temporarily in this state. (*French* agt. *Maguire*, *ante*, 471.)

2. The Constitution of this state has given this court general jurisdiction in law and equity. And, under so broad a grant of authority, where it regularly acquires, by the service of its process, control over the parties, it must have authority to adjudicate upon their rights, in actions of this description. All that is required for that purpose is to affect and restrain their action, and that may properly be done wherever the party to be affected may be found and served with process. It is not an exercise of mere local, but an element of general, jurisdiction. (*Id.*)

3. An omission by a defendant, to deny facts which are entirely and peculiarly within his knowledge, will be regarded as sufficiently confirming them, to justify the court in acting upon the hypothesis of their truth. (*Id.*)

4. Where the plaintiffs alleged that they had acquired title to the unpublished drama, known as "Diplomacy," for the purpose of producing and exhibiting it within the United States, and that, in violation of their rights, the defendant is about producing it in a theater controlled by him in the city of San Francisco; then setting forth the agreement or contract of sale:

Held, that the fact that the sale relied upon in support of the action was made, may properly be assumed from the agreement which appears to have been so authenticated as to establish the fact of its genuineness. (*Id.*)

5. As a general proposition, it is legally true, that mere information as to the existence of the rights relied upon will not justify the issuing of an injunction. But when the informant is beyond the power of the court because of his residence in a foreign country, and where action more prompt than is consistent with the long delay necessary to obtain the

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affidavits of these foreign informants is required for the protection of the plaintiffs' rights, the court may act upon this information and issue an injunction, especially where the information itself is sustained and rendered entirely credible by circumstances well established in the case. (*Id.*)

6. To protect a person in the possession of an unpublished manuscript, the law does not require that it shall be the exclusive work of one individual. It may be that of one or many, acting in co-operation, and, whichever may be the case, the right is substantially the same, and the person is equally entitled to the protection of courts of justice. The same reasons that will induce security to the individual will extend it to all whose joint action may contribute to the result finally attained. (*Id.*)
7. By the common law, authors were protected in the enjoyment of the pecuniary benefits of their literary productions. (*Id.*)
8. The law still continues to maintain and protect the right of the author to his unpublished manuscript or composition, the same as it formerly did, independent of the statutes concerning copyrights. (*Id.*)
9. Exhibiting the manuscript or composition to others, or, where it may be adapted to that end, performing it by theatrical representations is not deemed sufficient to constitute the publication which will deprive the author of his exclusive right. (*Id.*)
10. Reading, exhibiting or performing, will permit the observer to appropriate to himself so much as his memory may be capable of retaining. (*Id.*)
11. But it will not allow the hearer and observer to appropriate and use the entire composition, with

its incidental stage accompaniments. That right is in the author and his assignee. (*Id.*)

CORPORATIONS.

1. As, by section 87 of the bankrupt act, a discharge from its debts is prohibited to a bankrupt corporation, a debt against it is not discharged, though proven; and the provision of section 21 prohibiting a creditor who has proved his debt from maintaining a suit therefor, does not apply as against a creditor of such corporation. (*Birmingham Bank* agt. *Keck*, ante, 222.)
2. It follows, therefore, that the mere proving of their claim against a corporation by the plaintiffs, on whose petition, together with other creditors, the company was thrown into bankruptcy, did not restrain them from further proceedings to enforce their claim by suit, and that they are not released from a compliance with the statute which requires the issue and return of an execution unsatisfied, either in whole or in part, before a right of action accrues against a stockholder (*Laws of 1848, chap. 40, sec. 24*). (*Id.*)
3. A compliance with the statutes of this state which give a right of action against the stockholders must be alleged in the complaint. If not so alleged a demurrer will lie. (*Id.*)
4. A suit in equity against directors of a corporation to recover damages for the waste and loss of the corporate assets caused by the negligence of the directors in the discharge of their official duties, should ordinarily be brought by the corporation. (*Hand and others* agt. *Atlantic National Bank*, ante, 231.)
5. The stockholders, however, may bring such suit where the corpo-

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- ration is still under the control of the accused trustees. (*Id.*)
6. When the suit is brought by stockholders the corporation is a necessary party defendant. (*Id.*)
7. When such corporation is an insolvent national bank and a receiver of its assets has been appointed by the comptroller of the currency, such receiver is also a necessary party defendant. (*Id.*)
8. The corporation, however, has no interest in the joinder of the receiver and cannot demur upon the ground of his non-joinder. (*Id.*)
9. A complaint in such an action which alleges, as the result of the defendants' negligence, that the plaintiffs' stock became worthless and that they had also been obliged to pay an assessment imposed by the comptroller of the currency under the national bank act in order to pay the debts of the bank, is not demurrable on the ground that several causes of action have been improperly united. Special elements of damage are alleged but only one cause of action. (*Id.*)
10. The president of a corporation cannot bind it for goods purchased by him, and required in its business, where there is a resolution upon the books of the corporation forbidding such officer from making such purchases. (*Westervelt* agt. *Radde*, ante, 369.)
11. The official powers of a corporation defined. (*Id.*)
12. The provisions of the statutes in relation to the formation of corporations (*Laws of 1848, chap. 40; Laws of 1866, chap. 709*) requiring the "duplicate certificate" to be filed in the office of the secretary of state is directory, merely, and not mandatory nor essential to the validity of the corporation, (*Rassebeck et al.* agt. *Desterreicher et al.*, ante, 514.)
13. The certificate having been filed in the office of the clerk, it is immaterial in any action (not brought by the state against the corporation to prohibit its exercise of corporate powers) to inquire whether the duplicate of such certificate has been filed in the office of the secretary of state. (*Id.*)
14. The production of a copy of the certificate filed with the county clerk, which copy is testified by him, being made evidence of the incorporation by the statutes, is sufficient proof of corporate existence and sufficient answer to all allegations of non-incorporation, except in a direct proceeding by the state to annul the franchise. (*Id.*)
- See NEGLIGENCE.
Donovan agt. *Board of Education*, ante, 176.
- See MORTGAGE.
(*Conkling* agt. *Secor Sewing Machine Co. et al.*, ante, 269.)
15. An action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by him of the corporate property can only be brought by a stockholder in his own name after application to, and a refusal on the part of the corporation to bring the action. (*Graves* agt. *Gouge*, 69 N. Y., 154.)
16. In case of such refusal, the stockholder may bring an action for the benefit of himself and other stockholders, but must make the corporation a party defendant, alleging in his complaint, and proving the refusal. (*Id.*)
17. The fact that the wrongful acts of the officer have depreciated the market value of the capital stock held by the stockholder, to an extent greater than its share of the actual loss sustained, does not authorize an action by the stockholder in his own name, without

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making the corporation a party, to recover the difference between the actual loss and the depreciation. (*Id.*)

COSTS.

1. Proceedings to vacate assessments are not special proceedings, within the purview of chapter 270 of the Laws of 1854, for the purpose of allowing costs. (*Matter of Jeter, ante, 87.*)

2. It seems that the allowance of costs in proceedings of this character is contrary to the established practice of the judges of this district; and, although the court felt compelled, under the circumstances of this case, to allow certain costs and disbursements, it is not to be regarded as a precedent in reference to costs to any amount whatever. (*Id.*)

3. The defendants are sureties on an administrator's bond, conditioned for the faithful execution of the trusts reposed in the administrators, and their obedience to all orders of the surrogate touching such administration. A creditor, represented by plaintiff as her counsel, filed her petition with the surrogate for an accounting by the administrators of all the effects received by them, and also for the payment of her claim. The administrators were required to account, and such account embraced their entire transactions in the estate, which was shown to be of the value of \$1,485. The surrogate directed payment, among other things, out of the moneys so shown to be in their hands, the sum of seventy dollars to the plaintiff, which was allowed him as a reasonable counsel fee in the proceedings, and which was less than five per cent upon the value of the property involved in the account.

Held, that in such a case the creditor is only entitled to an allowance upon his judgment, not upon

the value of the property sought to be reached.

Held, further, that the decree of the surrogate was not conclusive upon the sureties, as the surrogate exceeded his jurisdiction in making the allowance. (*Browning agt. Vanderhoven, &c., et al., ante, 87.*)

4. In an action for malicious prosecution, where the plaintiff recovers a verdict for six cents damages, he is entitled to six cents costs, but is not entitled to disbursements. (*Marsullo agt. Billotto, ante, 375.*)

5. Upon an appeal to the general term from an order of the special term overruling or sustaining a demurrer to the whole or a portion of the pleading, the successful party is entitled to tax, as costs, twenty dollars before, and forty dollars for argument. (*Van Gelden agt. Van Gelden, 13 Hun, 118.*)

6. Where an order is made at the special term sustaining or overruling a demurrer to the whole or a portion of the pleading, the successful party is entitled to the full costs of the trial of an issue of law; and where relief is granted to the unsuccessful party, it should be only upon the payment of those costs; and to grant it upon payment of ten dollars costs only is improper. (*Id.*)

7. In an action of ejectment the plaintiff recovered upon the trial before a referee; a new trial was ordered by the general term, costs to abide the event. On the second trial defendant obtained a verdict in his favor; a new trial was granted on the ground of newly-discovered evidence, on payment of \$150, costs and disbursements of the action, and ten dollars costs of the motion, after payment of which a third trial was had and a verdict rendered in favor of plaintiff.

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Held, that plaintiff was not entitled to tax costs for either the first or second trials, but only for the third. (*Provost agt. Farrell*, 13 Hun, 308.)

8. Fees paid to a stenographer and for preparation of maps cannot be taxed. (*Id.*)

9. On an appeal to the court of appeals, in a proceeding brought into the supreme court by a common law *certiorari*, directed to an officer or tribunal other than a court, the successful party is not entitled to costs as a matter of course; whether or not costs shall be awarded rests in the discretion of the court. (*People ex rel. Green agt. Smith*, 13 Hun, 227.)

10. The English rule prohibiting attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in this state. (*Hall agt. Crouse*, 13 Hun, 557.)

Of former trial—must be paid by applicant for a new trial on the ground of newly-discovered evidence. (*See Comstock agt. Dye*, 13 Hun, 118.)

Must be paid—when new trial is granted because of reversal of a former judgment, upon which the judgment in the principal action is paid. (*See Smith agt. Frankfield*, 13 Hun, 489.)

In an action to foreclose a mortgage the costs are in the discretion of the court. (*See Looze agt. Ellis*, 13 Hun, 656.)

11. Where a question of fact arising upon a motion is referred, as authorized by the Code (sec. 27), the court has no authority to allow disbursements in addition to ten dollars costs of motion. (*Concklin agt. Taylor*, 68 N. Y., 221.)

12. The disbursements upon a motion to vacate a satisfaction of a judg-

ment are not costs in an interlocutory proceeding, within section 811 of the Code, and no provision is made by the Code for their allowance. (*Id.*)

13. When costs are given by the judgment of this court, it means costs in this court to the successful party as against the unsuccessful party. (*Sisters of Charity agt. Kelly*, 68 N. Y., 628.)

In action requiring defendant to remove pier unlawfully erected in harbor of New York, extra allowance of five per cent, on value of pier not proper; subject-matter of action is the right to erect the pier, not its value. (*See People agt. N. Y. and S. I. Ferry Co.*, 68 N. Y., 71.)

See ATTORNEY AND CLIENT.

Struppman agt. Muller, ante, 427.

14. Where a judgment creditor, at whose instance a receiver has been appointed in supplementary proceedings, instigates and conducts a prosecution against third persons through the receiver for his own benefit, and in which he is solely interested, in case he is defeated he is liable for costs. (*Ward agt. Roy*, 69 N. Y., 96.)

15. The F. S. M. Co., a foreign corporation, had a general office in New York in charge of B. as agent. He had charge of collections in this state, and employed an attorney to collect a promissory note in his possession, belonging to the company. The attorney obtained judgment and instituted supplementary proceedings thereon, in which plaintiff was appointed receiver. This action was brought by and at the instance of said attorney to set aside as fraudulent a conveyance by the judgment debtor to defendants. B. did not authorize and was not informed of the commencement of the action; he was, however, ad-

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vised thereof before trial, and recognized the action of the attorney as being for the company. Defendants succeeded in their defense, and moved that the company be compelled to pay the costs. *Held*, that the facts justified the inference that the company, through B., with a knowledge of all the attorney had done, ratified his acts, and it was bound by them, although the attorney had no authority originally to commence the action; and that the company was properly charged with the costs. (*Id.*)

16. Upon a common law *certiorari* costs are not allowable. (*People ex rel. agt. McDonald*, 69 N. Y., 862.)

COUNTER-CLAIM.

In action for obstructing flow of water in stream the fact that plaintiff increased the natural flow to defendant's injury not a counter-claim. (*See Bloomer agt. Mores*, [Mem.] 68 N. Y., 628.)

COUNTY CLERK.

1. The provision of the act of 1840, "to reduce the expense of foreclosing mortgages" (*sec. 13, chap. 342, Laws of 1840*), prescribing the fees to be charged by a county clerk for making searches, was not intended as a substitute for the provision of the Revised Statutes fixing his fees for searches, except in the cases and when made for the purposes specified in the second section of said act *i. e.*, when made for the purposes of an action for foreclosure and the bill is taken as confessed, etc. (*Curtis agt. McNair*, 68 N. Y., 199.)
2. Under the provisions of the Revised Statutes (2 R. S., 639, *sec. 30*) a county clerk is entitled to charge for four distinct lines of searches at the rate of five cents

per year for each, *i. e.*, for searching the records of deeds, the records of mortgages, the records of mortgages deposited by loan officers, and the docket of judgments. (*Allen and Rapallo JJ.*, dissenting.) (*Id.*)

8. As to whether a like fee may be charged for searching other records affecting the title to real property, required to be kept by county clerks by acts passed subsequent to the Revised Statutes, *quære*. (*Id.*)

COUNTY COURT.

1. Under the provisions of the Code of Civil Procedure an appeal will lie to the general term from a judgment entered upon the report of a referee, in an action pending in a county court, upon a case and exceptions settled by such referee; and a prior motion for a new trial in the county court, upon the exceptions and the decision of the referee, is no longer requisite or proper. (*Kilmer agt. O'Brien*, 18 Hun, 224.)

COUNTY JUDGE.

1. The plaintiff in error was tried at a court of general sessions for grand larceny. After the jury had retired to consider their verdict both of the justices sitting with the county judge left the court room, and one of them left the building. While they were absent the jury came in and the county judge received their verdict of guilty. The jury were polled at the request of the prisoner's counsel, without any objection on his part to the reception of the verdict, in the absence of the two justices.

Held, that the county judge had no power to receive the verdict and that the conviction or sentence must be set aside. (*Hinman agt. People*, 18 Hun, 286.)

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COURTS.

1. To authorize the removal of an action from a state court to a federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign state or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action. (*Tugman agt. National Steamship Co.*, 13 Hun, 332.)

CREDITOR'S ACTION.

1. A court of equity does not intervene to enforce the payment of debts. It is only after the creditor has exhausted all the means in his power at law that he is entitled to the aid of a court of equity to discover and apply the debtor's property to satisfy his claims. (*Sloan et al. agt. Waring et al.*, ante, 62.)
2. A creditor at large has no *status* in a court of equity, and the right of a judgment creditor depends upon the fact of his having exhausted his legal remedies. (*Id.*)

DAMAGES.

1. This action was brought by the plaintiff against her brother, for the conversion of a note given to her for money borrowed by him. After the lapse of more than six years from the maturity of the note, he asked her to let him see it, promising to return it. Having obtained possession of it, he threw it into the stove and burned it up. The justice at the circuit charged, with reference to the amount of damages, that the plaintiff was entitled to recover the face of the note with interest; that, though outlawed, it constituted a moral obligation sufficient to uphold a new note or promise; that,

although the defendant could have pleaded the statute of limitations in an action upon the note, yet being a wrong-doer, he was entitled to no presumptions in his favor.

Held, that the charge was correct. (*Outhouse agt. Outhouse*, 13 Hun, 130.)

2. An action was brought to recover damages for injuries sustained by the plaintiff while crossing one of defendant's (a railroad company's) tracks, and alleged to have been caused by its defective condition. Upon the trial it appeared that, prior to the accident, plaintiff had worked on a farm and could do any work connected therewith; that by the accident his right leg was broken near the hip; that he was confined to his bed from the time of the accident in July to October first; was placed in a special bed and his leg kept extended by proper appliances for eight weeks; that his right leg was one inch and a-half shorter than the other; that he could go over even ground with one crutch; and had mowed on a mowing-machine, raked with a horse-rake, and driven his team on the road somewhat, but was not able to do much farm work; that the injury was permanent and he could never recover therefrom. The jury rendered a verdict in his favor for \$14,000. *Held*, that the verdict would not be set aside as excessive. (*Gale agt. N. Y. Central and H. R. R. Co.*, 13 Hun, 1.)
3. A building contract contained a clause authorizing the owner, upon the failure of the contractor to proceed with the work, to notify him that unless he did so proceed he should himself complete it and charge the contractor with the expense of so doing, and another clause providing that for each and every day's delay in completing the building after a date therein specified the contractor

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should pay the sum of five dollars as and for liquidated damages. The owner, in pursuance of the first clause, notified the contractor and completed the building himself. *Held*, that he had thereby waived his right to claim the damages provided for in the contract, for a failure to complete the building by the specified time. (*Crawford* agt. *Becker*, 13 *Hun*, 875.)

4. The defendants having, by false and fraudulent representations, induced the plaintiff to purchase certain railroad bonds, he, upon discovering the fraud some three years after the purchase, brought this action to recover the damages occasioned thereby. The defendants were acting as brokers, for both the purchasers and the sellers. Upon the trial the court charged, as to the measure of damages, that the plaintiff was entitled to recover the actual damages which resulted from defendants' conduct up to the time when he first discovered the fraud—the difference between the sum paid and the value of the stock—that is, the difference between the price paid and the actual value of the bonds at the time when the plaintiff discovered the fraud. *Held*, that the charge was incorrect; that the measure of damages was the difference between the actual value of the bonds at the time of the sale and their value as they were represented to be. (*Wyeth* agt. *Morris*, 18 *Hun*, 838.)

5. The plaintiff, in pursuance of a contract made with the defendant, claimed to be entitled, by virtue of a commutation ticket, to ride to East New York. Having exercised this right for some time the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of the defendant, the conductor ejected him from the train, using,

in so doing, no unnecessary violence. Upon the trial of this action, brought to recover damages for so doing, the court charged that the evidence was not sufficient to give punitive damages against the conductor, but that plaintiff was entitled to have the railroad, company punished to such an extent as the jury should, in their discretion say the facts authorized and demanded. *Held*, that the charge was erroneous. (*Parker* agt. *Long Island R. R. Co.*, 13 *Hun*, 819.)

6. In an action to recover damages resulting from a collision, plaintiffs' expenses, necessarily incurred in retaining his crew after the collision, and in attempting to save the cargo, are proper items of damage. (*Hoffman* agt. *Un. F. Co.*, 68 *N. Y.*, 386.)
7. Where an answer in an action of slander alleges, in justification, the truth of the words spoken, it is not error for the court to refuse to charge as matter of law, that the answer cannot be considered by the jury to enhance the damages. (*Distin* agt. *Rose*, 69 *N. Y.*, 123.)
8. Notwithstanding the change effected by the Code in allowing facts adduced for the purposes of justification, although insufficient for that purpose, to be used in mitigation of damages, still, where there is an entire failure of proof to sustain the charge contained in the alleged slanderous words, and the circumstances evince that the reiteration of the slander in the answer was done maliciously, and without probable cause for believing it true, it may be considered by the jury upon the question of damages. (*Id.*)
9. *It seems*, however, that this rule should be confined to cases of bad faith in incorporating the justification in the pleadings. (*Id.*)

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10. The rule limiting the damages in actions for breaches of covenants of seizin and of quiet enjoyment to the purchase-money paid and interest, does not apply where a vendor has sold lands to which he has not a perfect title, he undertaking to complete and make perfect the title. In such case, when the vendee has been evicted, the proper measure of damages is the value of the land at the time of the eviction, with interest. (*Taylor agt. Barnes*, 69 N. Y., 430.)
11. In an action for a wrongful taking and conversion of a stock of goods, where there is no question of malice or claim to recover exemplary damages, the proper measure of damages is the market value of the goods at the time of the tortious taking, with interest thereon. (*Wehle agt. Haviland*, 69 N. Y., 430.)
12. The market value is the price at which the goods can be replaced for money in the market; not the retail value or price for which they are sold at retail. (*Id.*)
13. In an action against a sheriff for failure to return an execution, it may be proved, in mitigation of damages, that prior to the return day the plaintiff's interest in the judgment was levied upon by virtue of an attachment, and was liable to be applied thereon. (*Wehle agt. Conner*, 69 N. Y., 546.)
14. Where a sheriff having an execution in his hands receives an attachment against the judgment creditor, and by virtue thereof levies upon the judgment debt, the attachment becomes a lien upon the judgment and execution, and all moneys collected upon the execution are liable to be applied toward the payment of any judgment recovered in the action wherein the attachment was issued; and, until the attachment is vacated, or the lien thereof in some manner discharged, it must be regarded as valid process, and the sheriff has no right to pay over to the judgment creditor moneys collected on the execution (*Id.*)
15. Where, therefore, it appears in an action against the sheriff for failure to return the execution that such a lien by attachment existed at the time of the commencement of the action, plaintiff is only entitled to nominal damage. The defendant's failure to perform his duty, although not justified or excused, does not entitle plaintiff to recover more than the damages he has actually sustained. (*Id.*)
16. The proper measure of damages in an action for the conversion of chattels is the value of the property at the time of the conversion, with interest to the time of the trial. (*Prince agt. Connor* [Mem.], 69 N. Y., 606.)

DEBTOR AND CREDITOR.

1. A judgment debtor, imprisoned on execution, who has disposed of his property with intent to defraud the creditor at whose suit he is imprisoned is not entitled to his discharge under the provisions of the Revised Statutes, in relation to voluntary assignment by debtors so imprisoned. (2 R. S., 81 *et seq.*) (*In re Brady*, 69 N. Y., 215.)
2. It is not necessary, to prevent such discharge, to show that the fraudulent disposition was made by the debtor with a view to the proceedings for his discharge; it is sufficient, although made before the commencement of the action, where the order for his imprisonment was based upon the ground of such fraudulent disposition. (*Id.*)
3. Where an opposing creditor establishes that the affidavit of the debtor required by said statute to be indorsed upon his petition (*sec.*

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5) is untrue, this is sufficient to show that "the proceedings, on the part of the prisoner, are not just and fair," within the meaning of said statute (sec. 8). (*Id.*)

4. *It seems* that to prevent a discharge, the intent must have been to defraud existing creditors, not those whose claims have been paid or have ceased to exist; and that creditor cannot contest the discharge who is in no way injured or defrauded. (*Id.*)

5. A proceeding under said statute is a special proceeding, as defined by the Code (secs. 1, 2, 3); and an order of special term therein discharging the petitioner is a final order, and is appealable to the general term, under the provisions of the act of 1854 (*chap. 270, Laws of 1854*), authorizing appeals in special proceedings. (ALLEN and MILLER, JJ., dissenting.) (*Id.*)

6. The right to review a special term decision in a matter affecting a substantial right, being general and fundamental, will be deemed to exist unless the intent to destroy it is expressed with great clearness. (*Id.*)

7. Where the creditors of a failing debtor contract with a third person to sell and assign to him their claims at a certain per centage, in the absence of proof that such third person was acting merely as agent of the debtor, the transaction is to be considered as a purchase and sale, not a compromise; and a creditor who has received the per centage agreed upon, and has assigned his claim, cannot enforce the balance of the indebtedness upon proof simply that some of the creditors received more than the stipulated per cent for their claims. (*Goldenbergh* agt. *Hoffman*, 69 N. Y., 82.)

DEEDS.

1. A sheriff's deed, given in pursuance of a sale upon execution, and

duly recorded, is protected by, and has the benefit of, the recording act. (1 R. S. 756, sec. 1.) (*Hetzl* agt. *Barber*, 69 N. Y., 1.)

DEFENSE.

1. The fact that the plaintiffs have brought an action against the owner of the vessel to recover the same damages which form the subject of this action, without also alleging that such an action had been prosecuted to judgment against the owner, and that the judgment had been paid, is not a good defense. (*Swift et al.*, agt. *Tross et al.*, ante, 255.)

2. Until the alleged damages have been received from, or paid by, the owner, it is no defense to this case that an action has been commenced against him. (*Id.*)

3. A plaintiff, suing upon an assigned claim, is the real party in interest, under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand; the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. While such an inquiry may become material if the right of creditors are involved, or when some defense or counter-claim against the assignor is sought to be interposed, it constitutes no defense on the ground that the plaintiff is not the real party in interest. (*Shoridan* agt. *Mayor, &c.*, 68 N. Y., 80.)

4. A plea of the statute of limitations of another state or country, where a contract was made, is no bar to an action brought upon the contract in this state; the *lex fori* governs. (*Miller* agt. *Brenham*, 68 N. Y., 88.)

5. On the 5th day of July, 1878, W. & J. filed their petition in bankruptcy; they had at that time a

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balance to their credit in defendant's bank. On the ninth of the same month they were adjudicated bankrupts. On the twelfth N. obtained a judgment for a money demand against them; on the nineteenth in proceedings supplementary to execution, an order was issued restraining defendant from transferring or making any disposition "of any property belonging" to W. & J.; and on the twenty-eighth a receiver was appointed, who demanded and claimed the said balance. On the 1st of October, 1873, plaintiff was appointed assignee of said bankrupts. Defendant refused to pay over to him the balance, and still retains it. In an action to recover the same, *held*, that by virtue of the bankrupt act (*U. S. R. S., sec. 5044*), title to the deposit vested in plaintiff on the fifth of July, and the order subsequently served on defendant did not restrain it from paying it over to him, as it was not then the property of W. & J. and that, therefore, the order was no defense. (*Morris* agt. *First Nat. Bk. of N. Y.*, 68 *N. Y.*, 362.)

6. Defendant, as sheriff by virtue of attachments against A. V. and J. S. V., levied on a stock of goods which they had sold to L., and he to plaintiff. An assignee in bankruptcy of A. V. and J. S. V. brought an action in the United States district court, making the parties hereto, the bankrupts L., and the attachment creditor, defendants claiming title to the property, and that the sale to the plaintiff was fraudulent and void. Defendant sold the property, and by order of said court deposited the avails. The decree in said action awarded the fund to the assignee. This action was brought to recover the property. *Held*, that said decree was properly pleaded in bar, and was *res adjudicata* between the parties as to plaintiff's title; that although the decree, by its terms, simply disposed of the fund, the title of plaintiff to the

property was necessarily involved, as the assignee could only have recovered by establishing his own title against all the other parties, and he had a right to accept the fund instead of the property or its value; that plaintiff, could not recover in this action, without having a general or special property in the goods; and that a plea of property in a third person was good. (*Tuska* agt. *O'Brien*, 68 *N. Y.*, 446.)

Payment to an officer *de facto*, when good defense in action by officer *de jure* to recover salary. (*See Dolon* agt. *Mayor, &c.*, 68 *N. Y.*, 274.)

In action based on judgment or other judicial record, they may be attacked and impeached for fraud. (*See Mandeville* agt. *Reynolds*, 68 *N. Y.*, 528.)

7. When process issued by justice of the peace is protection in action of false imprisonment (*Hallock* agt. *Dominy*, 69 *N. Y.*, 238.)
8. When prior possession a good defense in action to determine claims to real property. (*Ford* agt. *Belmont*, 69 *N. Y.*, 567.)

DEMURRER.

1. *Misjoinder* of parties plaintiff is ground of *demurrer* to the complaint. (*Rumsey* agt. *Lake*, *ante*, 339.)
2. Where husband and wife unite in bringing an action, and the complaint shows that one alone must bring the action without the other, a *demurrer* will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action. (*Id.*)
3. An action for an assault and battery upon the person of a married woman must be brought in her name alone, and if the husband

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unite in bringing the action a *demurrer* will lie on the ground that the complaint does not state facts sufficient to constitute a cause of action. (*Id.*)

4. The correct rule seems to be that if there is a misjoinder of parties, or, in other words, if the facts stated in the complaint show no cause of action against the defendant in *favor of one* of the plaintiffs, the defendant may demur, under subdivision 8 of section 144 of the Code, *as to such plaintiff* upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and as to such plaintiff the complaint will be dismissed. (*Id.*)

See PLEADING.

Victory Webb, &c., Manufacturing Co. agt. *Beecher et al.*, ante, 193.

See CORPORATIONS.

Birmingham National Bank agt. *Keck*, ante, 322.
Hand and others agt. *Atlantic National Bank*, ante, 232.

5. Upon an appeal to the general term from an order of the special term overruling or sustaining a demurrer to the whole or a portion of the pleading, the successful party is entitled to tax, as costs, twenty dollars before, and forty dollars for argument. (*Van Gelder* agt. *Van Gelder*, 13 *Hun*, 118.)
6. Where an order is made at the special term sustaining or overruling a demurrer to the whole or a portion of the pleading, the successful party is entitled to the full costs of the trial of an issue of law; and where relief is granted to the unsuccessful party, it should be only upon the payment of those costs; and to grant it upon payment of ten dollars costs is improper. (*Id.*)

Action of partition — allegations of

complaint — non-compliance with Rule 78 of 1876 — where the allegation is defective because of its uncertainty, the remedy is by motion, and not by demurrer. (*See Moffett* agt. *McLaughlin*, 13 *Hun*, 449.)

7. On demurrer to answer defects in complaint may be considered, and if it fails to state cause of action, decision must be for defendant, although answer is defective. (*Wright* agt. *Booth* [Mem.], 69 *N. Y.*, 620.)

DEPUTY SHERIFF.

Deputy sheriff may receive redemption of land sold by him on execution after expiration of term of office of his principal. (*See People ex rel.* agt. *Lynch*, 68 *N. Y.*, 474.)

Liability of sureties on his bond for false return. (*See Walter* agt. *Middleton*, 68 *N. Y.*, 605.)

DETERMINATION OF CLAIM TO REAL PROPERTY.

1. One in actual possession of land for three years may maintain an action under the Code (*sec.* 449) to compel the determination of claims thereto; and evidence of the possession is sufficient to compel the defendant to show his title. (*Ford* agt. *Belmont*, 69 *N. Y.*, 567.)
2. But where the plaintiff in such an action shows only possession under an unfounded claim of title, evidence of actual possession and occupation by defendant prior to the entry by plaintiff is a sufficient defense. (*Id.*)

DISCONTINUANCE.

1. After the evidence in a case has been agreed upon and submitted to the justice trying the same,

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and a motion to open the case and take further evidence has been denied by him, a discontinuance of the action should not be allowed. (*Clearwater* agt. *Decker*, 18 *Hun*, 88.)

DISCOVERY.

1. The application for a discovery of documents before trial should be denied in cases where it is clear that they may be produced on an examination, before trial, of an adverse party, under a *subpoena duces tecum*, when the object is only to prove circumstances as the foundation of relevant inferences, rather than a fact proximately probative of an issue. (*New England Iron Co.* agt. *N. Y. Loan and Improvement Co.*, *ante*, 351.)
2. To entitle a party to a discovery of documents before trial, the party applying shall show, to the satisfaction of the court or judge, "the materiality and necessity of the discovery sought, the particular information which he requires, and that there are entries of the matters he seeks a discovery of" (*Rule* 15). (*Id.*)
3. The New England Iron Company, in its suit against the Metropolitan Railway Company, for \$4,500,000 damages, for violation of a contract to furnish the iron for the elevated road, joined the New York Loan and Improvement Company as codefendant, claiming that the last-named company had aided and abetted the railroad company to commit the alleged breach of contract, the contract having been awarded finally to the Loan and Improvement Company. In the petition of plaintiffs for a discovery of documents before trial (alleged to be in the possession of the Loan and Improvement Company), it was claimed that these documents would prove circumstances of knowledge, motive and intent on the part of

such company, showing that they knowingly ousted the plaintiffs from the benefit they would have derived from the performance of their contract.

Held, that the petition should be dismissed on the ground that it did not point to the places where the information sought for existed, nor describe the entries, excepting by stating the supposed effect as evidence rather than their intrinsic character. (*Id.*)

4. Also, on the ground that it did not show any reason for resorting to this method of proof, either in expediency or necessity. (*Id.*)

EJECTMENT.

When the proper remedy — and not an action in equity, to remove a cloud on title. (*See Bockes* agt. *Lansing*, 18 *Hun*, 88.)

EQUALITY OF LIENS.

See MORTGAGE.

Eleventh Ward Savings Bank agt. *Hay*, *ante*, 444.

EQUITABLE ACTIONS.

1. Persons appointed by statute to hold official relations to a municipal corporation and charged with specific trusts and duties in respect to its property and its application, must act in conformity with the law which appoints them. When they act otherwise it is a breach of trust and abandonment of duty.

Hence, held, that a lease of ferries for a term of years, made by the commissioners of the sinking fund of the city of New York, at a *nominal rent of one dollar per annum*, the annual rent of which was of the value of more than \$100,000, was void; the rents being pledged by law to the sinking fund for the

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- payment of interest on the funded city debt, it was the duty of the commissioners to obtain the rental value of the ferries. (*The Mayor agt. Union Ferry Company, ante, 188*.)
2. An application to a court of equity for the cancellation of a deed is not a matter of right. It rests with the sound discretion of the court, according to what is reasonable under the circumstances of the particular case, whether the relief shall be granted or refused. The jurisdiction of the court is protective, preventive and remedial. (*Id.*)
 3. Where the law affords an adequate remedy equity will not interfere. But where adequate remedial justice is not complete at law, or is in doubt, equity will interfere and grant relief (*Vide, Mayor, etc., of N. Y. agt. North Shore Staten Island Ferry Co, post p. 154*). Ejectment will not lie for the recovery of a ferry franchise. (*Id.*)
 4. Where, in an action to set aside a deed as invalid, the relief depends upon facts extrinsic thereto such facts must be set up in the complaint. (*Id.*)
 5. An action in equity will lie to set aside a lease of ferries, illegally made, as a cloud upon the title (*Smith agt. The Mayor of N. Y., 68 N. Y. 552; Town of Venice agt. Woodruff, 62 id., 470; N. Y. and N. H. R. Co. agt. Schuyler, 17 id., 592*). (*Id.*)
 6. The municipal corporation stands in such relation to the ferry franchises that it may properly ask a court of equity to examine into the validity of conveyances thereof made by its officers and seek to have deeds which convey away such property to the injury of tax payers and creditors, and which are void or voidable, canceled and delivered up so that the property may be applied to the purposes to which it has by law been pledged. (*Id.*)
 7. An action in equity may be maintained by the mayor, aldermen and commonalty of the city of New York to set aside, as a cloud upon title, a lease of piers, bulk-heads and rights of wharfage made by the department of docks when the same was not made at public auction and to the highest bidder. (*The Mayor agt. North Shore Staten Island Ferry Company, ante, 154*)
 8. Piers and bulk-heads and wharves cannot be granted to the exclusive use of individuals or private corporations. (*Id.*)
 9. As the lease of piers and bulk-heads did not confer upon the lessee exclusive right to their possession, held, that an action of ejectment would not lie. Such action cannot be maintained for an incorporeal hereditament (*Mayor, etc., of New York agt. Brooklyn Ferry Company, ante, page 138*). (*Id.*)
 10. The plaintiff herein claimed that one George Webster, the owner of a house and lot described in the complaint herein, on September 26, 1846, made a general assignment of all his property, including the house and lot in question, to one Russell, who, on May 6, 1847, conveyed the same to Simeon D. Webster; that thereafter, and on July 6, 1859, the said George and Eleanor, his wife, conveyed the said premises to the said Simeon D.; that the plaintiff had succeeded to the rights of the said Simeon D.; that on April 18, 1861, a receiver, appointed in supplementary proceedings, instituted by a judgment creditor of George Webster, sold the said land to one Humphrey, through whom the defendants, who are in possession thereof, claim title.
This action was brought to have

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the receiver's deed set aside as irregular, and canceled, and for an accounting as to the rents and profits received by the defendants. *Held*, that the facts of the case would not sustain an action in equity, such as the present one, to set aside the deed as a cloud upon plaintiff's title; but that the plaintiff's remedy, if any, was by ejectment. (*Bockes* agt. *Lansing*, 13 *Hun*, 88.)

EQUITABLE JURISDICTION.

1. The objection that the plaintiff's remedy upon the facts stated in the complaint is at law and not in equity may be taken at the trial, although not set up in the answer, if taken before the defendant has submitted to the equitable jurisdiction of the action by proceeding to the trial on the merits (*Pam* agt. *Vilmar* [54 *How. P. R.*, 235], as to this point, explained). (*De Bussiere* agt. *Holladay* and others, ante, 210.)
2. An omission to demur or answer for such cause is no waiver of the objection that the court has no jurisdiction of the action, or that a cause of action is not disclosed by the complaint. The term "*jurisdiction*" in such case explained. (*Id.*)
3. There is no absolute want of jurisdiction in a court of equity to entertain an action to revoke a will or its probate for fraud. (*Id.*)
4. Where a complaint contains a cause of action it cannot be dismissed upon the ground that the plaintiff's remedy is at law and not in equity. The trial must proceed either before the court or a jury according to the nature of the case. (*Id.*)
5. The probate of a will obtained through fraud can be questioned in a court of equity, and may, upon sufficient grounds, be set aside

where the court which granted the probate is powerless to give relief. (*Id.*)

6. The legal remedy must be clear and ample to justify a court of equity in refusing to entertain an action to set aside a will. Where there is no complete remedy at law equity will entertain jurisdiction. The issues, in so far as they present questions of fact, should, however, be submitted to a jury. (*Id.*)
7. Relief may also be had in such action under chapter 283 of the Laws of 1853. (*Id.*)

ESTOPPEL.

See INSURANCE, FIRE.

Lasher agt. *Northwestern National Insurance Company*, ante, 818.

1. When a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference, he shall be estopped from denying it (*Cornish* agt. *Abington*, 4 *Hurt & Norman*, 556). (*Costello* agt. *Meade*, ante, 356.)
2. In 1832 E. Edmonston died, being then in possession, as was claimed, of a farm of 100 acres, leaving him surviving his widow and seven children, who continued in possession of the farm until 1844, when, by agreement, the east half was conveyed to the heirs in fee, and the west half to the widow, but whether in fee or for life was in dispute. The widow died in 1869, leaving a will by which she devised all her estate to her daughter, the defendant herein. Upon the trial of this action, brought by one of the children against the daughter, to recover his share of the west half, the daughter claimed that the west half belonged to the mother in fee,

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by gift from her brother, who was a tenant in common of the farm with her father, and that during the lifetime of the latter he had set apart the west half of the lot to the mother.

In the deeds of the east half, made in 1844, the lots were described as "being lot No. —, in the subdivision of the east half of the farm of Elijah Edmonston, late of Phelps aforesaid, deceased, *owned and occupied at his death.*" The plaintiff claimed that the widow, by executing deeds containing the words in italics, was estopped from denying that the whole lot belonged to her husband at the time of his death.

Held, that the words were too indefinite and uncertain to constitute an estoppel, as they might be construed as meaning that the east half only belonged to the husband. (*Edmonston agt. Edmonston*, 13 Hun, 133.)

3. That as the words in question were part of a description of premises, already sufficiently described, no estoppel was created by them. (*Id.*)
4. That even if they did constitute an estoppel, it was limited to questions arising on the deed itself, and would not apply to a collateral action, such as the present one, not founded upon the deed. (*Id.*)
5. That the declarations of the widow as to her title were admissible, as tending to characterize her possession, and to show that it was claimed under a title adverse to that of the heirs of Elijah Edmonston. (*Id.*)
6. In 1874 a promissory note made by one George W. Carpenter, a son of the defendant, and indorsed by the latter, was transferred to one McKee, who stated to the defendant that he had transferred it to one Hamlin, and that Hamlin said he wished defendant had signed it on its face. Subsequently Hamlin saw the defendant, and the latter having agreed to sign the note on the face, Hamlin produced the note, now in suit, and defendant signed it as surety. Subsequently the note was transferred to other persons and purchased by the plaintiff before maturity, and in good faith. Upon the trial of this action, brought upon the note, it appeared that the note signed by defendant was not the note originally indorsed by him, but was a copy thereof, upon which the signatures and indorsements had been forged by McKee. Defendant interposed this as a defense, alleging that at the time of signing his name at Hamlin's request, he made no examination of the note, because the face looked just like the one he had signed, and he supposed it was the same. *Held*, that the defendant having had full opportunity to examine the note as to its character and genuineness, and having failed so to do, preferring to rely upon the statements of McKee and Hamlin, he could not interpose such a defense in an action by one who purchased the same in good faith before maturity. (*Mosher agt. Carpenter*, 13 Hun, 602.)
7. When mortgagee not estopped from repudiating payment of mortgage to attorney. (*See Smith agt. Kidd*, 68 N. Y., 130.)
8. When tenant under lease in fee, who has taken contract of sale from landlord, not estopped from claiming title under the lease. (*See Millard agt. McMullin*, 68 N. Y., 346.)
9. A mortgagor receiving a sum intended to be in satisfaction and extinguishment of his equity of redemption, is not estopped thereby from asserting his right to redeem. (*See Odell agt. Montross* 68 N. Y., 490.)
10. It is not necessary to an equitable estoppel that the party should

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design to mislead; it is enough if the act or declaration was calculated to, and did in fact, mislead another acting in good faith and with reasonable diligence. (*Blair* agt. *Wait*, 69 *N. Y.*, 118.)

11. This action was upon a judgment; the defense was that the judgment had been settled and discharged. It appeared on the trial that, seven years after the rendition of the judgment, defendants, who had failed and were negotiating with their creditors for a compromise, agreed with one E., who was the attorney of record for plaintiff, and who assumed to own the judgment, to pay him, in settlement thereof, ten per cent of the judgment, to procure a release to him of an interest in certain real estate, and to make a settlement of a suit pending against the estate of E.'s father; they performed their agreement, and E. executed to them a satisfaction of the judgment. Evidence was given tending to show that E. was, in fact, the owner of said judgment; also that plaintiff represented to one of the defendants, at the time of the negotiation, for a settlement, that E. was the owner and had the right to cancel it, and if defendants settled with him it would be all right, upon which statement defendants relied and acted. *Held*, that the evidence was sufficient to sustain a verdict for defendants; that plaintiff was estopped by his declaration even if he remained the owner of the judgment. (*Id.*)
12. When tenant not estopped from setting up after acquired title in opposition to title of landlord. (*See Hotel* agt. *Barber*, 69 *N. Y.*, 1.)
13. When sureties to undertaking in replevin suit estopped from questioning recitals in undertaking. (*See Harrison* agt. *Wilkin*, 69 *N. Y.*, 412.)
14. When one sued as trustee of a

manufacturing corporation for failing to file annual report not estopped from denying organization. (*See De Witt* agt. *Hastings*, 69 *N. Y.*, 518.)

EVIDENCE.

1. This action was brought to recover upon a policy of insurance, issued by the defendant upon the life of the son of the plaintiff's assignor, for her benefit. In the application for insurance, signed by the son and plaintiff's assignor, in answer to a question as to the cause of his father's death, he stated "don't know." Upon the trial it was claimed by the defendant that the father died of consumption and that this fact was known to the plaintiff's assignor. Upon the examination of the plaintiff's assignor she was questioned as to the disease by which her husband died, and answered: "The doctors called it torpor of the liver and disease of the stomach and heart." It appeared that both of the physicians who had attended the husband were dead at the time of the trial. The defendant claimed that the evidence as to the statements of the doctors was inadmissible, as being mere hearsay.

Held, that the evidence was admissible as bearing upon the question of fact, whether or not the witness knew the disease with which her husband was afflicted and of which he died.

That the declaration was also admissible, as having been made by the doctors in the ordinary discharge of their professional duties. (*McNair* agt. *National Life Ins. Co.*, 18 *Hun*, 144.)

2. In 1832 E. Edmonston died, being then in possession, as was claimed, of a farm of 100 acres, leaving him surviving his widow and seven children, who continued in possession of the farm until 1844, when, by agreement, the east half

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was conveyed to the heirs in fee, and the west half to the widow, but whether in fee or for life was in dispute. The widow died in 1869, leaving a will by which she devised all her estate to her daughter, the defendant herein.

Upon the trial of this action, brought by one of the children against the daughter, to recover his share of the west half, the daughter claimed that the west half belonged to the mother in fee, by gift from her brother, who was a tenant in common of the farm with her father, and that during the lifetime of the latter he had set apart the west half of the lot to the mother.

In the deeds of the east half, made in 1844, the lots were described as "being lot No. —, in the subdivision of the east half of the farm of Elijah Edmonston, late of Phelps aforesaid, deceased, *owned and occupied at his death.*" The plaintiff claimed that the widow, by executing deeds containing the words in italics, was estopped from denying that the whole lot belonged to her husband at the time of his death.

Held, that the words were too indefinite and uncertain to constitute an estoppel, as they might be construed as meaning that the east half only belonged to the husband. (*Edmonston* agt. *Edmonston*, 18 *Hun*, 133.)

8. That as the words in question were part of a description of premises already sufficiently described, no estoppel was created by them. (*Id.*)
4. That even if they did constitute an estoppel, it was limited to questions arising on the deed itself, and would not apply to a collateral action, such as the present one, not founded upon the deed. (*Id.*)
5. That the declarations of the widow as to her title were admis-

sible, as tending to characterize her possession, and to show that it was claimed under a title adverse to that of the heirs of Elijah Edmonston. (*Id.*)

6. Section 25 of chapter 40 of the Laws of 1848, providing that the book containing the names of the stockholders which the company is required to keep, "shall be presumptive evidence of the facts therein stated in favor of the plaintiff, in any suit against any stockholder," does not make such book the only or even the best evidence of the fact that the defendant was a stockholder. (*Herries* agt. *Wesley*, 13 *Hun*, 492.)
7. In an action upon a note, an agreement that the defendant shall not be liable thereon according to the terms thereof, but only for so much as he shall receive upon a bond and mortgage given in exchange therefor, cannot be established by parol. (*Burhans* agt. *Carter*, 13 *Hun*, 153.)
8. This action was brought to recover the amount alleged to be due to the plaintiff upon a sale of certain real estate made by his assignor to the defendant. Upon the trial the person who drew the deed was called as a witness and stated, against the defendant's objection and exception, that the grantor, at the time he was executing the deed (the grantee not being present) stated to the witness that the purchase-price had not been paid, but that the grantee had promised to pay it whenever he should be requested so to do. *Held*, that the statement did not constitute a part of the *res gestae*, and should have been excluded. (*Trimmer* agt. *Trimmer*, 13 *Hun*, 182.)
9. Upon the trial of this action, brought by the plaintiff to recover for the breach of a contract made with her by the defendant's pre-

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- decessor, the principal issue of fact was as to the genuineness of the signature of the school commissioner, Strough, to a certificate that she was qualified to teach. Upon the trial Strough was called as a witness, and testified to the best of his knowledge and belief he did not sign or issue the certificate. He also testified that he kept a book, in which he entered the certificates issued by him during the month in which the certificate in question bore date. The counsel for defendant produced this book and offered it in evidence to show that it contained no entry of the certificate in question. Upon plaintiff's objection, the book was excluded. *Held*, that its exclusion was error. The counsel for defendant asked Mr. Strough whether, during his term of office, he was accustomed to issue such certificates except upon a personal examination of the applicant, which question was, upon the objection of plaintiff's counsel, excluded. *Held*, that this was error. (*Morrow* agt. *Ostrander*, 13 *Hun*, 219.)
10. Where a client refuses to pay his attorney's bill of costs, on the ground that he had been defeated and damaged by reason of the negligence and want of skill of his attorney, such negligence or want of skill must be established by him affirmatively, and it will not be presumed, as failure to succeed in a law suit is not *prima facie* evidence thereof. (*Seymour* agt. *Cogger*, 18 *Hun*, 29.)
11. Where a party was only entitled to the use of a limited quantity of water for a stream for mill purposes. *Held*, in an action brought against a neighboring mill-owner to prevent the latter's use of the water of the stream, that it rested upon the former to show that the quantity used by him was less than that to which he was entitled. (*Bullard* agt. *Saratoga Victory Mfg. Co.*, 18 *Hun*, 43.)
12. The defendant claimed that the action was barred by the statute of limitations. The note was dated March 1, 1864, payable one year after date. Upon the back of the note were indorsements of interest in the handwriting of the testatrix, dated in 1865, 1866, 1867, 1868 and 1869, and May 9, 1870. The action was commenced April 12, 1876. *Held*, as the indorsements purported to have been made by the testatrix before the note was outlawed, they were admissible in evidence against the defendant, without proof of actual payment. Whether or not such payments were actually made was a question for the jury. (*Risley* agt. *Wightman*, 13 *Hun*, 163.)
13. Upon the trial of an action for assault and battery, the defendant having called several witnesses who testified to the bad character of the plaintiff, a milliner, who had testified in her own behalf, she was recalled and asked: "How was it as to the better class of ladies in the village patronizing you up to that time?" *Held*, that the question was improper, and that the court erred in allowing it to be put and answered against the objection and exception of defendant's counsel. (*Hagadorn* agt. *Kearney*, 13 *Hun*, 236.)
14. A witness may be contradicted not only as to his testimony in chief, but also as to matters drawn out on his cross-examination, material to the issue, especially when the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination. (*Greenfield* agt. *People*, 13 *Hun*, 242.)
15. In reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power, and it is its duty, to pass upon the facts *de novo*, from

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the evidence adduced before the court below. (*Id.*)

16. Since the passage of the act of 1878, by which challenges both for principal cause and for favor are to be tried by the court, it is not necessary to reiterate, upon the challenge for favor, the evidence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges. (*Id.*)

17. Where, upon a challenge for favor, it appeared that the person challenged had a preconceived impression as to the guilt of the accused, based upon statements which he had read in an account of a former trial, which statements might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, *held*, that the challenge was properly overruled. (*Id.*)

18. In this action, brought for a partnership accounting, the defendant claimed that the accounts had been settled by an accord and satisfaction. The parties themselves were the principal witnesses and gave contradictory evidence. The defendant to impeach plaintiff's testimony denying the settlement, gave evidence to show that at the time of the settlement, plaintiff thought that defendant's father, a man of wealth, intended to leave his property to defendant in trust and not absolutely; and that subsequently, upon learning that the property was left to defendant absolutely, so that defendant was peculiarly responsible, he denied the settlement. Upon the trial the plaintiff offered to prove by a witness that he had denied that any settlement had been made before he knew the contents of the will of defendant's father.

Held, that the evidence was proper as tending to show that the plaintiff had denied the settlement, at a time when he could not have been impelled so to do by a knowledge of the change in defendant's pecuniary condition. (*Herrick* agt. *Smith*, 13 *Hun*, 446.)

19. Where an attempt is made to discredit a witness on the ground that when his testimony is given his interests prompt him to make a false statement, he may show that he made similar statements at a time when he had no advantage to derive from so doing. (*Id.*)

20. Upon the trial of an indictment against several persons for a conspiracy to cheat and defraud, depositions of one conspirator, taken upon his examination before a justice of the peace after his arrest for the alleged conspiracy, and several months after the accused had ceased to act together in furtherance of the conspiracy, are inadmissible as evidence against a coconspirator. (*Stone* agt. *People*, 13 *Hun*, 263.)

21. Where only that portion of an assessment in the city of Brooklyn which is in excess of the fair value of the actual local improvement is subject to review by petition, it rests upon the petitioner to allege and prove the existence and amount of such excess. (*Matter of Mead*, 13 *Hun*, 849.)

22. Upon the trial of the plaintiff in error for obtaining money by false pretenses the prosecution, in order to prove the existence of a mortgage upon the prisoner's house, produced a certificate of the clerk of Jefferson county tending to show the existence of a mortgage on defendant's house and lot in Watertown, which was rejected because it did not contain a copy of the whole mortgage. The district attorney was then sworn and testified, under objection, that in a certain

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conversation the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000 given to trustees to secure bonds negotiated by them.

Held, that as the prosecution had not accounted for the non-production of the mortgage itself, the record, or a copy thereof, the admission by the prisoner was not admissible to prove the existence or terms of the mortgage. (*Sherman* agt. *People* 13 *Hun*, 576.)

23. *Semble*, that the admissions of a party are competent evidence, only when parol evidence of the facts sought to be shown by such admissions would be competent. (*Id.*)

24. *Semble*, that admissions are never admissible to establish the legal effect of documents. (*Id.*)

25. *Semble*, that in an action by the assignee of a policy of insurance, issued upon the life of his assignor, to recover the amount thereof, declarations made by the assignor are not admissible in evidence against the plaintiff, whether made before or after the issuing of the policy.

In no event can declarations made after the issuing of the policy be admitted. (*Edington* agt. *Aetna Life Ins. Co.*, 13 *Hun*, 543.)

26. Parol evidence is admissible to show that a mortgage was given to secure advances to be made by a party not named in the mortgage. (*See Hall* agt. *Crouse*, 13 *Hun*, 557.)

27. False imprisonment — confining persons supposed to have smallpox — delivery of, to hospital ambulance — injury subsequently received in ambulance and hospital — evidence of, not admissible on question of damages in action for

the prior confinement. (*See Rider* agt. *Fuller*, 13 *Hun*, 669.)

28. In an action upon a judgment alleged to have been recovered in California, a record of judgment was introduced in evidence containing a certificate of service of the summons to the effect that it was personally served on "defendant *Brennan*" and defendant *Sanders* "by delivering to said defendant personally" a copy of the same. The names of the defendants were *Brenham* and *Sanders*. *Held*, that the certificate was sufficient to show service on the defendants it not appearing that any person by the name of *Brennan* was a party or had any connection with the action; and that the variance in the name did not affect the validity of the judgment. (*Müller* agt. *Brenham* 68 *N. Y.* 83.)

29. The declarations of a testator, alone, are not competent evidence to prove acts of others amounting to undue influence; but when acts are proved, such declarations may be given in evidence to show the operation they had upon the mind of the testator. (*Cudney* agt. *Cudney*, 68 *N. Y.*, 148.)

30. Where no title to land is claimed under the foreclosure of a mortgage by advertisement, the fact of the service of the notice of sale upon the mortgagor or other person affected by the proceedings may be shown, in support of the title, by any common law evidence, in the absence of an affidavit showing such service. (*Mowry* agt. *Sanborn*, 68 *N. Y.*, 153.)

31. The section of the Revised Statutes in reference to foreclosure by advertisement (*sec.* 14, 2 *R. S.*, 547), giving to the affidavits therein specified the effect of a deed cannot be so construed as to include an affidavit of service. The affidavits therein mentioned, when no deed has been executed, are evi-

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- dence of foreclosure in the same manner and to the same effect as if a deed had been executed. (*Id.*)
82. The fact that the vendor of goods charges them upon his books to an agent instead of the principal, although strong, is not conclusive evidence that the credit was given exclusively to the agent. (*Foster agt. Persch*, 68 *N. Y.*, 400.)
83. One S. having been present at the making of an oral agreement between the parties was requested by them to reduce the same to writing for them to sign. In an action upon the contract the paper drawn up by S. which the parties had not signed, was offered in evidence. S. testified that it contained the agreement, as he was directed to draw it, with the exception of two articles inserted in it; that while he could not state the whole of the agreement without a reference to the writing that he could recollect the substance of the conversation after such a reference. *Held*, that the paper was properly excluded; that it was not admissible as a memorandum of what actually took place, as it appeared that it was not an accurate statement thereof, but only embodied the result, and contained provisions not in the original agreement that it was not competent with a view of refreshing the witness' recollection, as he testified that after reference to the paper he could recollect the material part of the conversation, and it was unnecessary to read it in evidence; and that it was not competent, as a paper drawn by the common agent of the parties, because the authority to draw the paper did not establish that relationship, and it had never been ratified or approved by the parties. (*Flood agt. Mitchell*, 68 *N. Y.*, 507.)
84. The contract was for the constructing and grading of a race track up to and in accordance with a grade established and agreed upon. One defense was that plaintiff had not performed. Upon the trial, defendant for the alleged purpose of showing that there was a substantial failure to perform, and not to show the amount of damages, offered to prove by himself that after plaintiff quit work it was worth \$500 to fill up the track to the grade established, the offer was rejected. *Held*, error. (*Id.*)
85. In an action upon a judgment, in case the judgment roll has been lost, or destroyed, secondary evidence may be given of its contents. (*Mandeville agt. Reynolds*, 68 *N. Y.*, 528.)
86. It being the duty of the county clerk to have and keep the roll on deposit in his office (*Code, secs. 281, 282*), if it cannot be found in the particular place provided for such deposit, the presumption is that it is lost or destroyed. (*Id.*)
87. Where the judgment is alleged to have been by confession, declarations of defendant that there had been a judgment confessed for a pre-existing debt are competent. (*Id.*)
88. Where a lost paper which was the basis of official action, was of a kind usually drawn up in accordance with a statute, and usually following a printed form devised therefor it is to be presumed that the paper was in the usual form and followed the requirements of the statute. (*Id.*)
89. In an action under the Code where the action or defense is based upon a judgment or other judicial record, the record may be attacked and impeached for fraud or for collusion, with knowledge and in disregard of the rights of the party attacking it; such party is not bound to resort to an action or proceeding direct for the

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- purpose of avoiding the record. (*Id.*)
40. Schedules of indebtedness made by a bankrupt, not competent evidence to show insolvency in action by assignee to recover a payment alleged to have been made by the bankrupt with intent to give a preference. (*See Tyler* agt. *Brook*, 68 N. Y., 418.)
41. Where a party offers to prove certain facts by documentary evidence, for the purpose of ruling upon the offer it must be assumed that the evidence would establish the facts stated, unless this can be said to be impossible, and if proof of the fact is competent, the rejection of the evidence is error. (*See N. Y. D. and P. Estabmt.* agt. *Burdell* [Mem.], 68 N. Y., 613.)
42. Where improper evidence is received upon a point which is afterwards abandoned, and this is so stated in the judge's charge, the error is cured. (*See Bloomer* agt. *Moras* [Mem.], 68 N. Y., 623.)
43. An assessment lease executed by the corporate authorities of the city of Albany, upon a sale made under the city charter of 1828 (secs. 4, 5, chap. 164, *Laws* of 1828), is not *prima facie* evidence of the regularity of the proceedings, or the sale; the act requires official action and record evidence of the principal steps, preliminary to a sale; and to sustain it the proceedings must be proved. (*Hulton* agt. *Bender*, 69 N. Y., 75.)
44. The clause of said charter declaring that the purchaser shall "hold the land against the owner and all persons claiming it," does not obviate the necessity of such proof. (*Id.*)
45. Upon the trial of an indictment under the act of 1854 (chap. 74, *Laws* of 1854), for an assault with a dangerous weapon, evidence on the part of the defendant, that the assault was committed in defending his property, or that of others intrusted to his care, against a trespasser seeking to take forcible possession, is competent, both upon the question as to whether to the extent that force may be lawfully used in the defense of one's goods, the assault was justified, and also upon the question whether the assault was "with intent to do bodily harm." If the intention was merely to defend the possession, although unjustifiable means may have been resorted to, the offense is not within the statute. (*Filkens* agt. *People*, 69 N. Y., 101.)
46. The presumption that a party intends the ordinary and probable consequences of his acts is not conclusive, but may be rebutted by competent evidence. (*Id.*)
47. Where the complaint, in an action to recover rent, alleging a leasing for a term of seven years, held, that it was competent to prove a verbal lease for that term or for a shorter period; also that, if this were not so, the court at special term, on motion for a new trial on the judge's minutes made after judgment, could allow an amendment conforming the pleadings to the proof. (*Thomas* agt. *Nelson*, 69 N. Y., 118.)
48. Plaintiff in such an action offered in evidence a memorandum, signed by himself, stating, in substance, that he was to give a lease to defendant for seven years; no rent was specified. Held, that this did not preclude him from proving the agreement by parol, as the memorandum was not itself the contract. (*Id.*)
49. In an action brought under the statute "providing redress for words imputing unchastity to a female" (chap. 219, *Laws* of 1871), plaintiff is not confined to proof of the charge set forth in the complaint; but evidence is competent

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of words spoken by defendant at any time before the commencement of the action, repeating substantially the same charge. (*Distin* agt. *Rose*, 69 *N. Y.*, 122.)

50. Where a witness called for plaintiff in such an action to prove the slanderous words in answer to a question upon cross-examination, as to whether he did not swear, upon another occasion, that he had never heard anybody speak disrespectfully of plaintiff, stated, without objection, what he did swear to, *held*, that it was competent for plaintiff's counsel, on re-direct-examination, to examine him upon that subject. (*Id.*)

51. Plaintiff, at the time of the speaking of the alleged slanderous words, was engaged as a school teacher. After a witness had stated on the trial that an appeal had been taken to the state superintendent of public instruction from a decision of the school commissioner in proceedings to remove the plaintiff, her counsel asked whether the commissioner or superintendent decided to remove her; this was objected to and excluded. Said counsel then asked whether plaintiff remained teaching after such decision; this was objected to generally, and objection overruled. *Held*, no error; that the objection did not present or call for a decision as to the form of the question; and that the fact proved was not rendered incompetent, because inferentially it might tend to establish what the decision was. (*Id.*)

52. *It seems* that a judgment taken by default in summary proceedings by a landlord for non-payment of rent is conclusive in an action by the landlord to recover rent, as to the existence and validity of the lease, the occupation by the tenant, and that some rent is due and unpaid; but it is not conclusive as to the amount of rent due, although it is alleged in

the affidavit upon which the proceedings were instituted. (*Jarvis* agt. *Driggs*, 69 *N. Y.*, 143.)

53. The plaintiff, however, upon such proof, is entitled at least to nominal damages, and where upon the trial the only question raised is as to his right to recover anything, an exception to a decision thereof in favor of plaintiff does not present for review any question as to the amount. (*Id.*)

54. By arrangement of the parties who were engaging in a joint adventure, in the purchase and sale of stock, the brokers, through whom the joint operations were conducted, kept the account thereof under the letter "M." By direction of defendant this account was closed, and the stock on hand purchased under the agreement was transferred to his individual account. It did not appear that the certificates of the stock were disturbed. In January, 1872, there was a sudden rise in the market when plaintiff made a formal call upon defendant to sell the stock, and to account to plaintiff for his portion of the profits, and upon his failure to comply, brought this action. Upon the trial defendant offered to prove that he sold all of the stock held on "M." account before January 9, 1872. This was excluded solely because not connected with an offer to prove that the sale was made avowedly on joint account. *Held*, error; that if defendant had authority to sell, it was not necessary to make known at the time of the sale that it was made on joint account, and if he made the sale in good faith, in the ordinary way, plaintiff was bound. (*Mars-ton* agt. *Gould*, 69 *N. Y.*, 221.)

55. Where specific objection is made to evidence offered, every ground of objection not specified which is capable of being obviated by evidence is waived. (*Id.*)

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56. Courts cannot take judicial notice of the width of streets or of sidewalks in a city, or of the ordinances of the municipal corporation establishing the same, defining the same, or prescribing and regulating their limits and extent. (*Porter* agt. *Waring*, 69 *N. Y.*, 250.)
57. A certificate of a street commissioner of the city of New York is not competent evidence of the width of a street or sidewalk therein. (*Id.*)
58. The rule which sanctions the introduction of record evidence upon an appeal, has no application to the ordinances of a municipal corporation. (*Id.*)
59. It seems that such evidence can only be received upon appeal to uphold the judgment, not to reverse it. (*Id.*)
60. The provision of the act of 1832 (*sec. 1, chap. 158, Laws of 1832*), authorizing ordinances of the common council of the city of New York to be read in evidence in all courts, relates to their introduction upon a trial, not to their being read in an appellate tribunal. (*Id.*)
61. In an action upon a policy of insurance issued upon the life of a husband for the benefit of the wife, the declarations of the insured, made some time prior to the application for the policy, are not competent to prove the existence of facts showing a breach of warranty, as that he had had a disease denied in the application. But where the facts are otherwise proved, and it is necessary to show that the insured had knowledge thereof, the declarations are competent for that purpose. (*Dilleber* agt. *Home L. Ins. Co.*, 69 *N. Y.*, 256.)
62. Information as to the condition of the insured acquired by a physician while attending upon him, which was necessary to enable the physician to prescribe, he is prohibited from disclosing (3 *R. S.*, 406, *sec. 78*), and he is incompetent as a witness to testify thereto. (*Id.*)
63. Plaintiff had a policy of insurance upon the life of her husband, issued by the H. L. Ins. Co., the annual premiums upon which were payable September eighth of each year. Defendant, in consideration of the delivery to it of the promissory note of plaintiff's husband, payable forty days from date, executed and delivered to plaintiff a written agreement dated November 26, 1872, by which, after acknowledging receipt of the H. L. Ins. Co. policy, it agreed to issue in exchange for it one of its own of the same amount, "and deliver the same within a reasonable time, and in the meantime keep the insurance." In an action upon the agreement, *held*, that it was not competent to show by parol that there was a condition to the agreement by which the note and policies were to be held until the premium was paid. (*Shaw* agt. *Rep. L. Ins. Co.*, 69 *N. Y.*, 286.)
64. In an action to recover damages for breach of contract of purchase and sale, in fixing damages the evidence in such case is not confined to market price at the precise time and place of delivery but where it is impracticable to show this, evidence of the price for a brief period before or after that time, and at places not distant, or in other controlling markets, is competent, not for the purpose of establishing a market price at another time and place, but for the purpose of showing the market price at the time and place of delivery. Where, therefore, there is no difficulty in making the proof, and the market price at the time and place of delivery is shown, it must control. (*Cohen* agt. *Platt*, 69 *N. Y.*, 349.)

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65. Oral admissions made by one who at the time held the title to land, to the effect that he had contracted by parol to sell the same to another, and had received the pay therefor, are competent evidence against all persons claiming title under or through him. (*Chadwick* agt. *Finner*, 69 N. Y., 404.)
66. In an action for the specific performance of an alleged parol contract for the sale of land by L., since deceased, through whom defendants derived title, to plaintiff, the latter claimed and gave evidence of admissions of L., tending to show that the price for the land was twelve dollars per acre which he had paid. Defendants claimed and proved admissions of plaintiff to the effect that the price was thirty dollars per acre. Plaintiff thereupon, as a witness in his own behalf, was asked: "Did you ever agree to pay thirty dollars an acre for the land?" This was objected to as inadmissible, under section 399 of the Code. The objection was overruled, and the plaintiff answered "no." *Held*, that the question was incompetent, as it directly involved a transaction with the deceased, and the reception of the evidence was error. (*Id.*)
67. As to whether in an action on the bond of a special administrator a decree of the surrogate adjudging defendant's principal to be in default and determining the amount thereof is competent evidence against the defendant to show a breach of the bond, it appearing by the decree that the citation upon which the proceedings before the surrogate were based was only served upon such principal by publication, *quære* (*MILLER and EARL, JJ.*, holding that it was competent, that the service was sufficient to give the surrogate jurisdiction; *CHURCH Ch. J., ALLEN and FOLGER, JJ.*, that it was not, that service by publication gave the surrogate no jurisdiction). (*Dayton* agt. *Johnson*, 69 N. Y., 419.)
68. Defendants having purchased certain premises at a state sale, assigned the certificate to plaintiff, contracting to make the payments thereafter to be made to the state, and to hold plaintiff "free from all payments, loss or damage on account of such payments." *Held*, that a record of judgment in an action of ejectment against plaintiff's tenant under which he was evicted because of failure to make the payments, was *prima facie* evidence against defendants, although they had no notice of the action; that it imposed upon them the burden of showing that there was a defense to the action and that their title to the premises had not become forfeited. (*Taylor* agt. *Barnes*, 69 N. Y., 430.)
69. An assignment of a policy of life insurance, absolute on the face, may be shown by parol to have been given simply as security. (*Matthews* agt. *Sheehan*, 69 N. Y., 585.)

EXAMINATION OF PARTIES.

1. The examination of an adverse party before trial, provided for by sections 870 and 872 of the Code of Civil Procedure, is not a mere substitute for the former remedy by bill of discovery. (*Hynes* agt. *McDermott*, *ante*, 259.)
2. The provisions of these sections are far more than that. They provide a simple plan of perpetuating testimony, and were intended as a substitute for article 5, chapter 7, title 3, part 3, Revised Statutes (2 R. S., 898, 899). Section 872 embraces the equitable remedy of perpetuating testimony, as well as the equitable remedy of a bill of discovery, and under it a defendant is entitled to obtain the testimony of a plaintiff, as a means of repelling his action. (*Id.*)

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3. In order to procure the examination of an adverse party before trial, under sections 870 and 872 of the Code of Civil Procedure, it is not necessary that the applicant should present to the court an affidavit embodying all or the major part of the allegations that were requisite in a bill of discovery. (*Id.*)
4. It is sufficient under these sections to state in the affidavit that the testimony of the party sought to be examined is *material and necessary*, and without any further statement it would seem to be imperative upon the court to grant the order; it is not necessary to state the very facts and circumstances, which the rules of equity pleading would have required to be stated in a bill of discovery. (*DALY, Ch. J., dissenting.*) (*See Phoenix agt. Dupuy, 53 How., 158, and Shepmoes agt. Bousson, 52 id., 401.*) (*Id.*)
5. Section 873 declares that the judge must grant the order when an affidavit is presented to him setting forth certain allegations. The applicant is not bound "to make it appear" to the judge, that is to convince him, by a mass of evidence, positive, direct or circumstantial, that those allegations are founded upon fact. The law requires the judge to take the applicant's word for them. (*Id.*)
6. The plaintiff brought her action of ejectment. The defendants denied her right to the land in suit. The plaintiff alleged that she was the widow of the man from whom the defendants had inherited the property in controversy. The defendants had never heard that their brother, whose heirs they were, had ever been married. After issue joined, they sought to examine the plaintiff as a party before trial.
Held, that this was a proper case for such an examination. (*Id.*)
7. Action by administrator against defendant, a practicing physician, to recover damages for negligence in causing the death of testator by giving to him an overdose of morphia. On the trial the wife of the plaintiff and mother of the deceased, also a daughter of the plaintiff, and the plaintiff himself, were examined as witnesses in his behalf. The wife and daughter testified to the visit of the defendant to the deceased, and the incidents thereof, whilst the plaintiff, who had been present in the sick room when the defendant was in attendance, testified to an interview he had with the defendant when the latter was summoned to the house:
Held, that, under the provisions of section 829 of the Code of Civil Procedure, the defendant was entitled to be examined in his behalf to prove what had taken place at his interview with the deceased at the visit, during which the plaintiff claimed that the alleged fatal dose of morphia was left with directions to be taken if the pain of the patient returned. (*Markell agt. Benson, ante, 360.*)
8. When the plaintiff testified to a conversation between him and the defendant which related and referred to the transaction between the deceased and the defendant, upon which the case turned, he gave evidence "concerning the same transaction or communication" upon which the defendant was subsequently examined. (*Id.*)
9. Evidence of admissions as to what took place at a certain time concern the transaction to which they refer. The language of the section does not limit the examination of a party in his own behalf to the solitary case when his opponent had detailed the events of a transaction or communication from personal knowledge because present thereat, but permits him to be examined "concerning a personal transaction or communication between the witness and

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the deceased person," when the * * * administrator * * * is examined in his own behalf * * * concerning the same transaction or communication. (*Id.*)

10. Where the wife of the administrator is allowed to testify concerning a personal transaction or communication between the deceased person and the defendant, the defendant should also be allowed to be examined in his own behalf concerning the "same transaction or communication." (*Id.*)
11. Section 899 of the old Code commented on, and a nice distinction drawn between that section and section 829 of the Code of Civil Procedure. (*Id.*)
12. There is no way under the Code of Civil Procedure, or in the law of this state, now to perpetuate the testimony of a party defendant at his own instance. (*Montague agt. Worstell, ante, 406.*)
13. Under the Code of Civil Procedure any person can be examined conditionally before trial at the instance of either party to a suit. But a party to an action cannot be thus examined, excepting at the instance of the adverse party. (*Id.*)
14. Section 870 of the Code of Civil Procedure was amended by chapter 299 of the Laws of 1878 so as to obviate the objection pointed out, and now a party may be examined at his own instance before trial. (*See note, ante, 525.*)

EXCEPTIONS

1. Where a verdict is ordered subject to the opinion of the court at general term, without qualification, exceptions cannot be heard, and the only question for the general term is which party is entitled to final judgment on the uncontroverted facts; no new trial can be granted, but final judgment

must be rendered for one party or the other without regard to which party had the verdict. (*Durant agt. Abendroth, 89 N. Y., 148.*)

2. Such a direction is therefore improper where exceptions have been taken upon the trial, or where the facts are controverted. (*Id.*)
3. Where such an order also directed exceptions to be heard at first instance at general term: *Held*, that the use of the words, "Subject to the opinion of the court at general term," did not deprive the unsuccessful party of the benefit of his exceptions; but that said words were mere surplusage. (*Id.*)

Where upon trial the only question raised is as to plaintiff's right to recover any thing, an exception to a decision thereof in favor of plaintiff does not present for review any question as to amount. (*See Jarvis agt. Driggs, 69 N. Y., 148.*)

4. In an action upon an assigned claim, plaintiff's counsel requested the court to direct a verdict for plaintiff; the court denied the request, submitting, however, to the jury simply the question as to the right of the plaintiff to maintain the action, and charging that if the transfer was a "sham instrument," plaintiff should be defeated, if not, that he was entitled to recover. Plaintiff's counsel excepted to the refusal to direct a verdict. *Held*, that the exception was sufficient to present the question as to plaintiff's right to maintain the action. (*Sheridan agt. Mayor, dec., 68 N. Y., 80.*)
5. Where, upon the trial of an action, the court directs a verdict for defendant, an exception to the ruling, in the absence of any thing from which it may be implied that the right to go to the jury

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has been waived, is sufficient to present the objection upon appeal, that there were questions of fact which should have been submitted to the jury; it is not necessary to request that any fact be so submitted. (*Trustee, &c., agt. Kirk*, 68 N. Y., 459.)

6. Under the provision of the act of 1847 (*chap. 410, Laws of 1847*), providing for the redemption of land sold on execution, a redemption made by a creditor on or after the last day of the fifteen months, must be made at the sheriff's office, to the officer who made the sale; if the sale was made by a deputy sheriff, the redemption must be made to him, although the sheriff be present; it is only in case of his absence from the office that redemption can be made to the sheriff (*sec. 3*). (*People ex rel. agt. Lynch*, 68 N. Y., 478.)

7. A deputy sheriff may execute deeds of land sold by him and receive redemption after the expiration of the term of office of his principal; and although such term has expired, redemption must be made to him if in attendance at the sheriff's office, and not to the present sheriff his undersheriff or deputies. (*Id.*)

On motion to dismiss complaint on trial before referee, decision should be made at time, and exception taken, or referee should be requested to decide, and exception be taken to his refusal in order to raise question on appeal; his report will not be considered as a nonsuit, but as a decision on the merits. (*See Van Derlip agt. Keyser*, 68 N. Y., 444.)

EXECUTION.

Neglect of sheriff to enforce, in replevin suit. (*See Hoffman agt. Conner*, 18 Hun, 541.)

Levy under by sheriff — when suffi-

cient to sustain replevin or action for conversion. (*See Alcord agt. Haynes*, 18 Hun, 26.)

1. A redemption by a creditor of lands sold upon execution made on or after the last day of the fifteen months from the day of sale, to be valid, must be made at the office of the sheriff of the county in which the sale took place; if made at another place, although in the same village and to the sheriff who made the sale, it is invalid. (*Morse agt. Purvis*, 68 N. Y., 225.)

2. A sale was made January 16, 1869; *held*, that April 16, 1870, was the last day for redemption. (*Id.*)

3. The language of the Revised Statutes in relation to the docketing and satisfaction of judgments (2 R. S., 362, *sec. 26*), to the effect that a judgment shall be deemed satisfied to the amount returned collected on an execution issued thereon "unless such return shall be vacated by the court," does not, under the Code, require a vacation to be sought by motion or action directly to that end; and in an action on a judgment, defended upon the ground of an entry of satisfaction, the satisfaction may be attacked for collusion or fraud, and a judgment for the plaintiff is as effectual a *vacatur* as if one had been obtained in a direct proceeding. (*Mandeville agt. Reynolds*, 68 N. Y., 529.)

4. An execution against the body of R., issued to plaintiff, as sheriff, was delivered by him to defendant, M., his deputy, who could have, but omitted to arrest the execution debtor, and returned the process to plaintiff with the statement that R. could not be found, whereupon plaintiff made return of "not found." After the false return, but before any action therefor had been brought, R. was surrendered by his bail to, and taken into custody by, plain-

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tiff; but before the bail had taken the necessary steps to exonerate themselves from liability upon their bond, plaintiff wrongfully discharged him, in consequence whereof the bail were held liable for the judgment, and in turn recovered of plaintiff. In an action against M. and the sureties, upon his bond, *held*, that it was no defense that plaintiff's undersheriff had knowledge that the return was false; that the knowledge of the undersheriff was not imputable to the sheriff as between him and his deputy; but that the fault of the deputy having been remedied by the surrender, and the damages sustained by plaintiff having been occasioned by his own subsequent wrongful act in discharging R., he could not recover such damages of defendants. (*Walter agt Middleton*, 68 N. Y., 605.)

5. A sheriff's deed, given in pursuance of a sale upon execution, and duly recorded, is protected by and has the benefit of the recording act (1 R. S., 758, sec. 1). (*Hetzel agt Barber*, 69 N. Y., 1.)

6. In an action against a sheriff for failure to return an execution, it may be proved, in mitigation of damages, that prior to the return day the plaintiff's interest in the judgment was levied upon by virtue of an attachment, and was liable to be applied thereon. (*Wehle agt Conner*, 69 N. Y., 546.)

7. Where a sheriff having an execution in his hands, receives an attachment against the judgment creditor, and by virtue thereof levies upon the judgment debt, the attachment becomes a lien upon the judgment and execution, and all moneys collected upon the execution are liable to be applied toward the payment of any judgment recovered in the action wherein the attachment was issued; and, until the attachment is vacated, or the lien thereof in

some manner discharged, it must be regarded as valid process, and the sheriff has no right to pay over to the judgment creditor moneys collected on the execution. (*Id.*)

8. Where, therefore, it appears in an action against the sheriff for failure to return the execution that such a lien by attachment existed at the time of the commencement of the action, plaintiff is only entitled to nominal damage. The defendant's failure to perform his duty, although not justified or excused, does not entitle plaintiff to recover more than the damages he has actually sustained. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. A surrogate has no jurisdiction upon a final accounting to hear and determine the validity of a disputed claim against the estate of a deceased person.

Where, upon a final accounting, the executrix presents an account in which is contained an item for money paid by her to a creditor, in settlement of a claim against the estate, which item is objected to and attacked by her co-executor and by the other persons interested in the estate, the surrogate has no jurisdiction to determine as to the validity of the same, or to refer the same to an auditor. (*Boughton agt Flint*, 18 Hun, 206.)

2. Although section 839 of the old Code authorized the court to dispense with or limit the security, required by sections 835, 836, 837 and 838 to be given upon an appeal, when the appellant was an executor, administrator or trustee acting in the right of another, yet when an executor without making any application to have the security limited or dispensed with gives the security in the ordinary form, the giving of such under-

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taking will be taken as an admission by him that he has sufficient assets applicable to the payment of the judgment appealed from, to satisfy the same. (*Yates* agt. *Burch*, 13 Hun, 622.)

Appointed in this state—may sue in courts of this state to recover for negligent killing of their testator or intestate in New Jersey, and recover under statute of that state. (*See Stallknecht* agt. *Pennsylvania R. R. Co.*, 13 Hun, 451.)

FEDERAL COURT.

1. To authorize the removal of an action from a state to a federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign state or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action. (*Tugman* agt. *National Steamship Co.*, 13 Hun, 832.)

FEES.

1. Paid to a stenographer, and for preparation of maps, cannot be taxed as disbursements. (*See Probst* agt. *Farrell*, 13 Hun, 308.)

FERRY FRANCHISES.

1. Where the law affords an adequate remedy equity will not interfere. But where adequate remedial justice is not complete at law, or is in doubt, equity will interfere and grant relief (*Vide, Mayor, &c., of N. Y.* agt. *North Shore Staten Island Ferry Co.*, post p. 154). Ejectment will not lie for the recovery of a ferry franchise. (*The Mayor* agt. *Union Ferry Company*, ante, 138.)
2. An action in equity will lie to set aside a lease of ferries, illegally

made, as a cloud upon the title (*Smith* agt. *The Mayor of N. Y.*, 68 N. Y., 552; *Town of Venice* agt. *Woodruff*, 62 id., 470; *N. Y. and N. H. R. R. Co.* agt. *Schuyler*, 17 id., 592). (*Id.*)

FINDINGS.

1. Upon a motion for an order to send back a case to a referee for further findings, it appeared that he had already passed upon such questions by refusing to find as requested, and that in each case the party requesting the finding had duly excepted to his refusal so to find.

Held, that the motion was properly denied, as upon such a motion the special term was not authorized to look into the whole case and determine that the referee ought to decide questions presented to him differently from what he had already done. (*People* agt. *Bank of North America*, 13 Hun, 434.)

2. In an action against a married woman for goods sold, the referee found that the goods were purchased by defendant's husband as her agent; that she carried on the business, for the purposes of which they were purchased, and they were delivered to her; that they were charged to the husband by plaintiffs upon their books, but in so doing they did not intend to exonerate the defendant from liability; and as conclusion of law the referee found that defendant was liable. *Held*, that the findings did not show upon their face that the conclusion was erroneous; and, there being some evidence to sustain them, that an order reversing the judgment entered upon the referee's report, which did not state that the reversal was upon questions of fact, was error. (*Foster* agt. *Perach*, 68 N. Y., 400.)

3. In an action to restrain the in-

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fringement of plaintiffs' trade mark, the complaint alleged that plaintiffs manufactured brandy which they put up and sold in "quart and pint bottles," and upon the bottles put the trade-mark in question. The court found that defendants pirated plaintiffs' trade-mark, but found that plaintiffs did not use quart or pint bottles as alleged in their complaint, but falsely and deceitfully used bottles presented and represented to be "quart and pint," which did not hold that quantity, and that the trade-mark was designed and used to protect the fraud, and upon this ground dismissed the complaint. This ground was not set up in the answer, and did not appear to have been litigated on the trial. Nothing appeared upon the bottles, which were transparent, to indicate the quantity contained, nor did it appear that such bottles were used in the trade as measures of quantity, or that purchasers did not understand perfectly their capacity, or that plaintiffs ever represented that they contained quarts or pints, or that they ever deceived any one, or that the trade-mark was or could be used to deceive. It appeared that plaintiffs' brandy is imported, and is entered at the custom-house with the true quantity stated, and that the bottles are of the ordinary size used in the trade. *Held*, that the findings of fact and conclusion therefrom were erroneous. (*Hennessey* agt. *Wheeler*, 69 N. Y., 271.)

4. Where the defense of usury is interposed, the affirmative of the issue is upon the defendant, and where the case is tried by a referee and the transaction is equivocal, defendant must give evidence of facts showing the alleged illegal intent, and have the fact found by the referee; it cannot be adjudged in the first instance by this court on appeal. (*Haughwout* agt. *Garrison*, 69 N. Y., 339.)

5. In an action upon guaranties of

certain bonds, where the defense was usury, the referee found, in substance, that plaintiffs having commenced legal proceedings against defendant S., and caused his property to be attached, S. agreed to settle by paying his indebtedness and the costs and expenses of the proceedings; that plaintiffs presented their account, in which they charged \$500 counsel fees, claimed to have been paid or incurred in the proceedings, and refused to release the attachment unless it was paid; that S. thereupon allowed the same, and the bonds in question, with guaranties, were given on the settlement. There was no finding or request to find that the \$500 was paid as a consideration for forbearance and that it was plaintiff's intent to exact usurious interest. *Held*, that the question of usury could not be raised upon the record. (*Id.*)

6. When findings of fact by general term unauthorized. (*See Durant* agt. *Abendroth*, 69 N. Y., 148.)
7. What findings of fact as to fraud in summary proceedings sufficient to authorize setting aside proceedings and restoration of lessee to possession. (*See Elverson* agt. *Vanderpoel* [Mem.], 69 N. Y., 610.)

FORECLOSURE.

1. Where title to lands is claimed under the foreclosure of a mortgage by advertisement, the fact of the service of the notice of sale upon the mortgagor or other person affected by the proceedings may be shown, in support of the title, by any common-law evidence, in the absence of an affidavit showing such service. (*Mowry* agt. *Sanborn*, 68 N. Y., 153.)
2. The section of the Revised Statutes in reference to foreclosure by advertisement (*sec.* 14, 2 R. S., 547), giving to the affidavits therein

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specified the effect of a deed, cannot be so construed as to include an affidavit of service. The affidavits therein mentioned, when no deed has been executed, are evidence of foreclosure in the same manner and to the same effect as if a deed had been executed. (*Id.*)

8. Since the passage of the act requiring service of notice of sale (*sec. 5, chap. 846, Laws of 1844*) and that a copy shall be affixed in a book by the county clerk (*chap. 808, Laws of 1857*), the affidavits specified in said section are not alone evidence of a complete foreclosure, and the party claiming under the foreclosure is bound to show all the facts necessary to a valid sale before he can sustain title under it. (*Id.*)

4. As to whether a mortgage given to secure unliquidated demands can be foreclosed by advertisement, *quære*. (*Id.*)

5. A notice of sale as filed in the clerk's office and as published for the first four weeks was by mistake dated April 23, 1858, instead of 1868. *Held*, that the mistake was obvious on inspection, could not have misled, and did not invalidate the proceedings. (*Id.*)

6. The history of the legislation on the subject of foreclosure by advertisement, given. (*Id.*)

7. A defendant in an action to foreclose a mortgage may appear therein by attorney after judgment, and upon such appearance is entitled to notice of subsequent proceedings. (*Martine agt. Lowenstein, 68 N. Y., 456.*)

8. A defendant so appearing after judgment is entitled to service of notice of filing the referee's report of sale (*Rule 89 of 1874; Rule 80 of 1878*), and, not having received such notice, exceptions to the report filed by him more than eight days after the filing of the report

are in time; but, even if exceptions are required to be filed in eight days after the filing of the report, the supreme court can permit the filing of, and allow defendant to be heard upon the exceptions after that time; and an order authorizing such filing, and recognizing the sufficiency of defendants' appearance is not reviewable here. (*Id.*)

9. Foreclosure of mortgage of railroad corporations having simply the right to the use of lands, when it does not affect rights of owners of the fee. (*See Strong agt. City of Brooklyn, 68 N. Y., 1.*)

FORMER ADJUDICATION.

1. A justice of the peace, in an action regularly brought before him to recover a penalty for less than \$200, has jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty; and his judgment, so long as it remains unreversed is conclusive between the parties upon every question necessarily embraced therein. (*Hallock agt. Dominy, 69 N. Y., 238.*)

2. The award of canal appraisers, while they keep within their jurisdiction, cannot be attacked collaterally for mere errors of judgment; but they are officers of very special and limited jurisdiction, and where they have acted without or in excess of their jurisdiction, this may be shown in avoidance of the award in proceedings by *mandamus* to enforce it. (*People ex rel. agt. Schuyler, 69 N. Y., 243.*)

FRAUD.

1. One who has been induced, by fraud or misrepresentation, to enter into a contract, may, after

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the discovery of the alleged fraud and with full knowledge of the facts, affirm the contract and waive the fraud. (*Balheimer* agt. *Reichardt*, ante, 414.)

2. Where the fact was established that after defendant had been informed of the alleged misrepresentations, and had refused to carry out the contract, he, nevertheless, applied to, and obtained from plaintiff an extension of the time of performance, on his (defendant's) promise to execute it. This was on the day preceding the day first fixed in contract for the performance, and on that day a paper was executed by both parties, extending the time five days, and agreeing that the contract should be closed on that day:

Held, that this paper should be regarded as a positive affirmation of the contract by the defendant, after he had become possessed of a knowledge of all the facts, which he now claims entitle him to a rescission or cancellation of the contract, and that plaintiff is entitled to a decree for specific performance. (*Id.*)

See COMPLAINT.

Brown agt. *Burkett*, ante, 33.

See ARREST.

Anderson agt. *Hunt*, ante, 336.

FRIVOLOUS ANSWER.

1. In an action to recover for liquors sold to the defendant, the defendant set up that the plaintiff had accepted the defendant's promissory note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due. -

Held, that as the answer did not allege that the note so accepted was a negotiable note, it was properly overruled as frivolous. (*Webster* agt. *Bainbridge*, 13 *Hun*, 180.)

GENERAL TERM.

1. Where an order of general term reversing a judgment entered upon the report of a referee does not state that the reversal is upon questions of fact, unless some error of law appears in the case, the order cannot be sustained in this court; the evidence cannot be looked into here for the purpose of ascertaining whether the general term should have reversed on the ground that the findings of fact were against the weight of evidence. (*Foster* agt. *Perach*, 68 *N. Y.*, 400.)
2. Where a verdict is ordered subject to the opinion of the general term, without qualification, exceptions cannot be heard, and the only question for the general term is which party is entitled to final judgment on the uncontroverted facts; no new trial can be granted, but final judgment must be rendered for one party or the other, without regard to which party had the verdict. (*Durant* agt. *Abendroth*, 69 *N. Y.*, 148.)
3. Such a direction is therefore improper where exceptions have been taken upon the trial, or where the facts are controverted. (*Id.*)
4. Where such an order also directed the exceptions to be heard at first instance at general term: *Held*, that the use of the words, "Subject to the opinion of the court at general term," did not deprive the unsuccessful party of the benefit of his exceptions; but that said words were mere surplusage. (*Id.*)
5. In such a case findings of fact by the general term are unauthorized and cannot be regarded; but being mere surplusage they do not vitiate a judgment. (*Id.*)
6. The provision of the Code (sec. 830) authorizing the appellate court on appeal from a judgment

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to reverse, affirm or modify the judgment does not authorize the general term where it has decided that a judgment in favor of plaintiff in an action upon a contract for services, or upon a *quantum meruit*, is erroneous, to determine upon the examination of conflicting evidence what sum plaintiff ought to recover, and render judgment therefor; it should in such cases, award a new trial. (*Whitehead agt. Kennedy*, 89 N. Y., 462.)

7. It seems that when in an action upon a contract a recovery has been had upon distinct and separate items, and error either of fact or law has been committed in respect to one or more of them, the general term may, if no other error exists, instead of reversing the judgment absolutely, reverse it only as to the erroneous items, and affirm it as to the residue; provided the plaintiff consents to forego his claim to recover them. (*Id.*)

8. The authorities holding that on appeal from an order made on motion to set aside a verdict for excessive damages, in an action of tort for injuries to the person, the general term has power to make an order reversing the judgment and granting a new trial, unless the plaintiff consent to reduce the damage to a specified sum, and in that case affirming it for that amount, distinguished. (*Id.*)

GIFT MORTIS CAUSA.

1. The deceased, during his lifetime, had made a deposit in the Ulster County Savings Institution to the credit and in the name of the defendant, his son. He had been accustomed, whilst living, to stop with one G. C. V. When the deceased was about seventy-three years of age, and about two weeks before his death, he was leaving the house of said G. C., and com-

plained of his health and said he should not live long. He further said, leaving with George C. the box which contained the bank-book, "that he intended that for the defendant and that G. C. must let no other person have it, except there was five dollars for S." In about two weeks from this time the deceased died. He said to another witness "he had money in the bank for his son George; the reason why he had done this was, he had given a farm to M. and he did not like him. He had done for the rest, and never done any thing for George." The key to the trunk which contained the bank-book, was found in the pocket-book of the deceased after death.

Held, that this was a valid gift *mortis causa* and must be upheld. (*Vandermark agt. Vandermark, ante*, 408.)

GRANTOR AND GRANTEE.

1. Where the grantor of an equity of redemption in mortgaged premises is not personally liable to the holder of the mortgage for the payment thereof, his grantee incurs no personal liability to the holder of the mortgage, by reason of a clause contained in the deed, whereby the payment of such mortgage is, in terms, assumed and agreed to be paid by the grantee, as part of the consideration of the conveyance. (*Cashman agt. Henry, ante*, 234.)
2. The rule that an action on a promise made by one person to another for the benefit of a third, may be brought by the third party against the promisor, can be invoked only in cases where the promisee was charged with some legal obligation or duty towards the third party. (*Id.*)
3. The burden of establishing the validity of a contract made by a married woman is upon him who asserts it. (*Id.*)

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4. Plaintiff conveyed to S. certain premises and took back a purchase-money bond and mortgage for \$20,000. S. subsequently conveyed the premises to C., a married woman, by a deed stating \$31,000 as the consideration, and containing a clause in the usual form reciting that the premises were conveyed subject to said mortgage, which the party of the second part assumed and agreed to pay. C. subsequently conveyed said premises to H. by a deed, stating \$30,000 as the consideration, and containing a similar assumption clause. In an action to foreclose said mortgage, no evidence was offered, outside the deeds themselves, tending to show that the alleged contract of C. to assume payment of the mortgage was one of that class of contracts which a married woman can make. *Held*, that C. was never personally liable to plaintiff for the payment of such mortgage, nor was her separate estate, other than the mortgaged premises, ever charged therewith; and consequently that H. was not liable for a deficiency upon the sale under foreclosure. (*Id.*)

HUSBAND AND WIFE.

1. Where an entry upon premises is made by a husband under claim of title, by virtue of a grant to himself and wife as joint tenants, and they continue in joint occupation thereof, the wife asserting a claim to the land and to the possession in her own right, she is properly joined with her husband and is a necessary party defendant in an action of ejectment. (*Stewart agt. Patrick*, 68 N. Y., 451.)

IMPRISONMENT.

1. A judgment debtor, imprisoned on execution, who has disposed of his property with intent to de-

fraud the creditor at whose suit he is imprisoned, is not entitled to his discharge under the provisions of the Revised Statutes, in relation to voluntary assignments by debtors so imprisoned (2 R. S., 81 *et seq.*). (*In re Brady*, 69 N. Y., 215.)

2. It is not necessary, to prevent such discharge, to show that the fraudulent disposition was made by the debtor with a view to the proceedings for his discharge; it is sufficient although made before the commencement of the action, where the order for his imprisonment was based upon the ground of such fraudulent disposition. (*Id.*)

3. Where an opposing creditor establishes that the affidavit of the debtor required by said statute to be indorsed upon his petition (*sec. 5*) is untrue, this is sufficient to show that "the proceedings, on the part of the prisoner, are not just and fair," within the meaning of said statute (*sec. 8*). (*Id.*)

4. *It seems* that to prevent a discharge, the intent must have been to defraud existing creditors, not those whose claims have been paid or have ceased to exist; and that a creditor cannot contest the discharge who is in no way injured or defrauded. (*Id.*)

INJUNCTION.

1. Where the papers submitted in opposition to a motion to dissolve an injunction fail to show how the rights of the plaintiffs are to be injured irreparably by the action sought to be restrained by the injunction, and where it appears that if the party whose election is sought to be restrained shall, after his election, threaten or attempt to do some act in violation of the rights of the plaintiff, they can then institute proper proceed-

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ings to guard against such injury as shall be imminent to it, the motion will be granted. (*Clinton Liberal Institute et al. agt. Fletcher et al.*, ante, 431.)

2. Plaintiff obtained an injunction order restraining the defendants, as an executive board of the State Convention of Universalists, from proceeding to elect a trustee to fill a vacancy occasioned by the death of one Barnum, who was a trustee of the Clinton Liberal Institute at the time of his death. The plaintiffs insist that the executive board have no power to fill the vacancy in the board of trustees; the defendants insist to the contrary:

Held, not to be a proper case for an injunction. (*Id.*)

3. The supreme court of this state has jurisdiction and authority to grant an injunction, at the suit of a resident plaintiff, against a non-resident defendant, restraining him from performing or exhibiting a drama, in a foreign state, in violation of plaintiffs' rights, where the summons and the injunction order are served on defendant, while he is temporarily in this state. (*French agt. Maguire*, ante, 471.)

4. The Constitution of this state has given this court general jurisdiction in law and equity. And, under so broad a grant of authority, where it regularly acquires, by the service of its process, control over the parties, it must have authority to adjudicate upon their rights, in actions of this description. All that is required for that purpose is to affect and restrain their action, and that may properly be done wherever the party to be affected may be found and served with process. It is not an exercise of mere local, but an element of general, jurisdiction. (*Id.*)

5. An omission by a defendant, to deny facts which are entirely and

peculiarly within his knowledge, will be regarded as sufficiently confirming them, to justify the court in acting upon the hypothesis of their truth. (*Id.*)

6. As a general proposition, it is legally true, that mere information as to the existence of the rights relied upon will not justify the issuing of an injunction. But when the informant is beyond the power of the court because of his residence in a foreign country, and where action more prompt than is consistent with the long delay necessary to obtain the affidavits of these foreign informants is required for the protection of the plaintiffs' rights, the court may act upon this information and issue an injunction, especially where the information itself is sustained and rendered entirely credible by circumstances well established in the case. (*Id.*)

7. When an action for the foreclosure of a mortgage, made by a corporation, is pending in another state, to which action a judgment creditor of the corporation is a party defendant, who has by his answer, interposed as a defense the invalidity of the mortgage, a court of equity in this state will not, upon the same grounds, disclosed in such answer, interfere by injunction at the creditors' instance, to enjoin the holders of the mortgage from prosecuting their action in another state, nor will it affirmatively decree the mortgage to be void. The question must be litigated in the action first brought. (*Conkling agt. Seor Sewing Machine Co.*, ante, 269.)

8. Equity disfavors a multiplicity of suits for the same substantial ends, and when full relief can be had in one action, another for the same object should not be allowed. Reasons for the application of such rules in this case, stated in the opinion. (*Id.*)

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9. Where an injunction was granted restraining a trustee of certain mortgage bondholders from carrying into effect an agreement whereby the terms of the mortgage as to time of payment and rate of interest were changed, and since the motion to dissolve the injunction was made an application has been made to another justice for the confirmation of the agreement, and such application has been refused by him, the injunction should be continued. (*Reinach* agt. *Meyer*, ante, 288.)
 10. The objection that the application was made, in an action in which the first mortgage bondholders were not made parties, is of no force. If it would not be equitable to the second mortgage bondholders to confirm the agreement the court ought not to confirm it in any proceeding. The fact is before the court that there are second mortgage bondholders, and also that in an application made, in an action in which they were parties, the court has refused to confirm the agreement. If the agreement is not just and fair to all parties it ought not to be confirmed. (*Id.*)
 11. The injunction should be continued when it is clear, from the papers, that if the trustee of one class of bondholders be permitted to carry out the agreement injustice will be done to another class of bondholders. (*Id.*)
 12. Where it is a very grave question whether the agreement is valid or not the injunction should be continued *pendente lite*. (*Id.*)
- See TRADE-MARK.
Enoch Morgan's Sons' Company agt. *Schwachhofer*, ante, 37.
Mauger agt. *Dick*, ante, 132.
13. Some seventeen years since, the plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont Railroad Company in its road-bed, which ran generally in the same direction, but at places two or three miles distant from plaintiff's road. At that time the plaintiff took up the tracks from a considerable portion of this route and ceased to use it, the road-bed being in most cases enclosed and used by the adjoining owners. Recently the defendant having acquired the rights and titles of some of the adjacent owners in and to the said road, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed. This action was brought by the plaintiff to restrain the defendant from so doing. Held, that it was not a proper case in which to grant a temporary injunction. (*Troy and Boston R. R. Co.* agt. *Boston, Hoosac Turn. and W. R. R. Co.*, 13 Hun, 60.)
 14. Defendant conveyed by warranty deed to plaintiff certain premises, upon which was situated a cheese factory, "during the time it shall be used * * * for the purpose of manufacturing cheese thereon," also the use of the water for the purpose of such manufacture, as then conducted from springs on other lands of defendant not conveyed; with the right to enter thereon to construct and repair the pipes for conducting the water, and the right, in case the water from the springs should prove insufficient for the business at the factory, to go upon such lands to dig other springs and conduct other water-courses to the factory. Defendant reserved the right to use water, in a specified way and for a specified purpose, but it was provided that he should not use it so as unnecessarily to interfere with the use of the water at the factory. After the conveyance, defendant unnecessarily made excavations and constructions upon his lands, which had the effect to materially diminish the supply of water from the springs, and to

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intercept the business of the factory, which acts were persisted in after their effect had become apparent. In an action to recover damages and to restrain defendant from diverting the water, *held*, that plaintiff was entitled to judgment; that defendant's acts were in derogation of his grant; that he was precluded thereby from doing any act on his own land which should divert or diminish the supply of water, flowing at the time of the grant, from the springs to the factory; and that it was immaterial whether the supply was diminished by interference with known water-courses, or by excavations, which withdrew water from the springs by percolation, or prevented its reaching them. (*Johnstown Cheese Manuf. Co. agt. Veghte*, 69 N. Y., 16.)

15. In an action brought by plaintiffs, who compose the firm of "Devlin & Co.," to restrain defendant from using their firm name, an injunction order was granted, restraining defendant from displaying upon signs, etc., said firm name, and confining him to the use of his own "proper Christian and surname conjoined," without devices which may tend "to mislead or induce the public to believe or suppose that he is the plaintiffs." Defendant thereafter put out a sign, upon which was "Devlin's clothing;" over the word "Devlin's," were defendant's initials, "J. S.," with the number of his store "826" on each side of the initials. *Held*, that the facts justified a finding that the words and letters were so arranged as to deceive, and were so intended; and that an order adjudging defendant guilty of contempt was proper. (*Devlin agt. Devlin*, 69 N. Y., 212.)

INSOLVENT DEBTOR.

1. A judgment debtor, imprisoned on execution, who has disposed of

his property with intent to defraud the creditor at whose suit he is imprisoned, is not entitled to his discharge under the provisions of the Revised Statutes in relation to voluntary assignments by debtors so imprisoned (3 R. S., 31, *et seq.*). (*In re Brady*, 69 N. Y., 215.)

2. It is not necessary to prevent such discharge to show that the fraudulent disposition was made by the debtor with a view to the proceedings for his discharge; it is sufficient, although made before the commencement of the action, where the order for his imprisonment was based upon the ground of such fraudulent disposition. (*Id.*)
3. Where an opposing creditor establishes that the affidavit of the debtor required by said statute to be indorsed upon his petition (*sec. 5*) is untrue, this is sufficient to show that "the proceedings on the part of the prisoner, are not just and fair," within the meaning of said statute (*sec. 8*). (*Id.*)
4. It seems that to prevent a discharge, the intent must have been to defraud existing creditors, not those whose claims have been paid or have ceased to exist; and that a creditor cannot contest the discharge who is in no way injured or defrauded. (*Id.*)
5. A proceeding under said statute is a special proceeding, as defined by the Code (*secs. 1, 2, 3*); and an order of special term therein discharging the petitioner is a final order, and is appealable to the general term, under the provisions of the act of 1854 (*chap. 270, Laws of 1854*) authorizing appeals in special proceedings. (*ALLEN and MILLER JJ.*, dissenting.) (*Id.*)
6. The right to review a special term decision in a matter affecting a substantial right, being general and fundamental, will be

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deemed to exist unless the intent to destroy it is expressed with great clearness. (*Id.*)

7. An assignment by an insolvent debtor, purporting to have been made under the provisions of the Revised Statutes "relating to voluntary assignments made pursuant to an application of an insolvent and his creditors" (2 R. S., 16, *et seq.*), is invalid as a conveyance of the insolvent's estate, at least as against one who is not a *bona fide* purchaser from the assignee for value without notice, where the preliminary proceedings upon which it is based are void because not in conformity with the statute. (*Rockwell agt. McGovern*, 69 N. Y., 294.)

8. The mention of a nominal pecuniary consideration in the assignment does not validate it, where it appears by the assignment itself that the intention was to create a statutory trust, and to convey no other estate or interest than was necessary for that purpose. (*Id.*)

INSURANCE COMPANY.

1. By the eighth section of the act of 1869, entitled "An act to authorize life insurance companies to make special deposits of securities in the insurance department and to authorize the superintendent to require special reports, and also to provide for the appointment of receivers of such depositing companies in certain cases" (*Laws of 1869, chap. 902*), it is provided that if the actuary reports the corporation *solvent*, and "the actuary's report shall be confirmed by the court," the receiver *may* continue the corporate business by receiving and collecting premiums, discharging obligations, &c., &c. When, however, the actuary reports the company *insolvent* the receiver is commanded to "notify the superintendent

thereof, who *shall*, with the consent and advice of the treasurer of the state, and in such manner as the said receiver, superintendent and treasurer, or a majority of them, shall determine, sell and convert such securities into money," &c. On a motion by receiver for instructions upon the actuary's report showing the company to be insolvent: *Held*, that in such case the court has no power over the actuary's report. (*Matter of the Mutual Life Insurance Co., ante*, 77.)

2. Although, in case the actuary's report sustains the solvency of the company, it *must* be confirmed by the court before the business can be continued as the statute directs; such confirmation is not required when the actuary's report is adverse to the company's solvency. (*Id.*)

3. The duties of an actuary appointed by a receiver of an insurance company pursuant to the provisions of the act (*Laws of 1869, chap. 902*), relate only to those specified in section 8 of the act, and terminates with his report, unless such duties are continued by the court, and the compensation which is to be paid must be fixed by the court, and is not under the control of the receiver, superintendent of insurance or actuary. (*Matter of North American Life Insurance Company, ante*, 465.)

See USURY.

John Hancock Mutual Life Insurance Co. agt. Nichols, ante, 898.

INSURANCE (FIRE).

1. Where the policy of insurance was issued to plaintiff as the owner of certain personal property, the language used therein importing that there was a warranty by her that she was the owner thereof in fact at the time of such insurance

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when she really was only the possessor of such property under a contract of purchase upon which she had made payments to a considerable amount, and where the defendant (the insurance company) was truly apprised by her, at the time of the application for the policy, of her interest in the insured property, and the company itself, after such information, writing the application, making out and delivering the policy as sufficient in form and language to indemnify the parties interested against loss by fire to the extent stated in such policy, and receiving from the insured the premium on the faith of the validity of the insurance:

Held, that on such a state of facts the plaintiff was entitled to recover. (*Lasher* agt. *Northwestern National Insurance Co.*, ante, 318.)

2. When an insurance company has not been in any way deceived, and when it draws an application for a policy in a particular form, stating, in effect, that it truly embodies the position the party occupies as to the property from such statement, and then upon the receipt of the premium delivers a policy as valid and effectual to indemnify the insured against loss by fire to the property under the circumstances truthfully disclosed:

Held, that such company cannot set up the want of literal and exact truth in the papers which it has itself prepared, and allege its own ignorance or fraud as a defense to the contract which it delivered as valid and legal. (*Id.*)

3. Upon such facts the company is *estopped* from denying the truth of the written statements which it has caused the insured to make. (*Id.*)
4. There can be no breach of a warranty unless its falsity can be shown. (*Id.*)

5. Where both parties, with a knowledge of the actual facts, contract upon the faith that the legal position resulting from such actual facts is truly expressed in writing, and so long as there is no actual fraud or misrepresentation, both parties are concluded and *estopped* from denying the truth of that which has thus been expressed. (*Id.*)

6. The case of *Kennedy* agt. *St. Lawrence County Mutual Insurance Company* (10 Barb., 289) commented on and criticised. (*Id.*)

7. Where a policy of insurance contained a clause to the effect that "if differences of opinion should arise between the parties hereto as to the amount of loss or damage upon property partially damaged, the subject shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement they to select a third) who shall, under oath, ascertain, estimate and appraise such partial loss or damage upon each article separately, and their award in writing shall be binding on the parties hereto, each party paying one-half the expense of reference:"

Held, that the insured could recover without an offer to refer, where there is no dispute "as to the amount of loss or damage," the only question being as to the validity of the policy. The clause in the policy provides only for a case of difference as to the amount of a loss. (*Id.*)

8. Where, by a policy of fire insurance, a portion of the loss is made payable to a third person, "as his interest may appear," the language imports an ownership in the property in such third person. (*Lasher* agt. *Northwestern National Insurance Co.*, ante, 324.)
9. A provision in the printed part of a policy of fire insurance, that "if the interest of the assured be any

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thing more than the entire, unconditional and sole ownership of the property, * * * it must be so expressed in the written part of the policy, otherwise the policy shall be void," may be waived by the company. (*Id.*)

10. The policy of insurance insured "J. L. on her household furniture," &c., &c., as described in the policy, "loss, if any, payable to A. S. and W. L., as their interest may appear." The furniture upon which the insurance was effected was held by J. L. under an agreement for its purchase with the other two plaintiffs, A. S. and W. L., who retained the title until the purchase-price was fully paid, which price was to be paid in installments, she having, under certain restrictions, the right to possess and use the property. The policy contained, in the printed part thereof, this clause: "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the said assured, it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void."

Held, that J. L. had an insurable interest in the property.

Held, also, that the provision in the written part of the policy, that the "loss, if any," shall be "payable to A. S. and W. L., as their interest may appear," is equivalent to an express declaration that J. L.'s interest is less than that of "entire, unconditional and sole ownership;" and the requirement in the printed clause of the policy has been literally complied with by an announcement in the written part thereof that A. S. and J. L. have an interest in the property. (*Id.*)

Held, further, that even if the printed clause in the policy required the *exact and true* interest of the assured in the property to be stated in the written part there-

of, the company have waived this requirement by issuing the policy and delivering it as one fully and completely obligatory. (*Id.*)

11. A clause in a policy of insurance requiring the payment of the premium before the policy takes effect may be *waived*, and such waiver may be shown by direct proof that credit was given, or may be inferred from circumstances. (*Id.*)

12. In an action on a policy of fire insurance, where the loss was payable to others than the party insured, the insured may be a proper and necessary party. In this case, though the loss was payable to others, from the nature of the insured's agreement with them, she having obligated herself to pay them an agreed price for the property insured and damaged by the fire, she had an interest in the subject of the action, and in obtaining the judgment demanded, and was properly joined as plaintiff (*Code of Procedure*, sec. 446). (*Id.*)

INSURANCE (LIFE).

1. The policy was issued and accepted upon the express condition enumerated therein, that if the party whose life was thereby insured should, without the written consent of the company previously obtained, travel upon the seas or pass beyond the civilized settlements within the United States, &c., &c., the policy should be void, null and of no effect. The insured, after having on the 4th of December, 1875, escaped from the custody of the sheriff of the city and county of New York, was, during the year 1876, found in the port of Vigo, in Spain, where he had gone without defendant's consent, from whence he was subsequently brought back to New York as a prisoner:

Held, that upon this state of facts an important condition upon which the policy had been issued

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and accepted was violated, and that in consequence thereof the contract between the parties came to an end by its own limitation, unless continued in force by some other provision or by defendant's waiver of the violation. (*Douglas agt. Knickerbocker Life Insurance Co., ante, 104.*)

2. Equity will not relieve against such violation, because the policy states that written permits will be granted on reasonable terms for persons insured in said company to make voyages to any foreign country. The granting of such a permit upon terms to be prescribed by the company involves a new bargain to be entered into by the parties to the original contract, which the court cannot make for them. The company has a right to determine each application for a permit upon its own facts, and with special reference to the additional risk to be incurred. (*Id.*)

3. Upon the back of the policy the following further stipulation appears: "It being understood and agreed that if, after the receipt by this company of not less than three or more annual premiums this policy should cease in consequence of the non-payment of premiums, then, upon a surrender of the same, the company will issue a new policy for the full value acquired under the old one, subject to any notes that may have been received on account of premiums, &c., &c." This stipulation appears at the foot of all the conditions, and was indorsed upon the policy in red ink, and separately signed by the president and secretary of the company:

Held, that this clause is available to the person whose life is insured, as well as to the beneficiaries. It is not a separate contract, because standing by itself, nor is it capable of separate execution or enforcement. There was no contract with the beneficiaries separate and apart from that made

with the person whose life was insured, nor did they acquire any vested rights after the payment of the third annual premium, which could not be divested by a subsequent breach of a condition not covered by the saving clause, nor were they entitled to notice of the election of the company to treat the policy as at an end in case of a violation of any of its conditions not embraced in the clause last referred to.

Held, further, that, regarding the plaintiffs exclusively in the light of beneficiaries, they having chosen the insured as the subject of risk under certain conditions which they agreed to accept, he having violated them, his breach is their breach, and by such breach the policy, by its express terms, became null and void.

Held, also, that the policy ceased to exist by the insured's travels upon the ocean to reach Spain; and hence, on the first day of October, 1876, there was no policy in force on which the premium could be paid. It had become null and void, and it could only be revived by the mutual agreement of the parties. No such agreement having been made, and there being no waiver of the violation, the plaintiffs could not, by electing on the 1st of October, 1876, to omit to pay the premium due on that day, impose upon the defendants the liability to issue a new policy for eight-tenths of the sum originally insured. (*Id.*)

JOINDER.

1. A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. (*Hay agt. Hay, 13 Hun, 315.*)

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JUDGE'S CHARGE.

1. Where, in an action for enticing a wife from her husband, the justice charged that, even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant (her father) by the wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his home, the plaintiff could not recover. *Held*, that the charge was correct. (*Smith* agt. *Lyke*, 13 *Hun*, 204.)
2. Whether or not a plaintiff had been guilty of negligence contributing to an injury, is a question for the jury, and it is not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence. (*Bevier* agt. *Delaware and Hudson Canal Co.*, 13 *Hun*, 254.)

JUDGMENT.

1. A judgment of a court of another state is only conclusive upon parties where it is a definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in this state. (*Taylor* agt. *Atlantic and Great Western Railway Co.*, *ante*, 275.)
2. Where an action is brought upon a judgment rendered in the supreme court between the same parties, without first obtaining leave to bring the action, the court has power to grant such leave *nunc pro tunc*. (*Church* agt. *Van Buren*, *ante*, 489.)
3. In an action brought to recover damages for a breach of a covenant of seizin the plaintiff, to prove the breach, put in evidence a judgment recovered by one Smith against the defendant establishing a lien in favor of Smith upon the property and a *lis pendens* filed at the commencement of that action. After a recovery of judgment by the plaintiff the judgment recovered by Smith was reversed, upon appeal, by the general term. Upon an appeal by the defendant from the judgment recovered by the plaintiff, and from an order denying a motion for a new trial *held*, that a new trial should be granted upon payment by the defendant of the costs of the first trial and of this appeal, and of ten dollars costs of opposing the motion below. (*Smith* agt. *Frankfield*, 13 *Hun*, 489.)
4. A motion by an assignee of a judgment to vacate a satisfaction thereof, executed by the judgment creditor after assignment is addressed to the discretion of the court; it may hear and determine the motion on the merits, or may compel the judgment debtor, in order to contest the validity of the judgment and the right of the claimant to collect the amount thereof, to bring an action for that purpose; and the exercise of this discretion cannot be interfered with by this court. (*Concklin* agt. *Taylor*, 68 *N. Y.*, 221.)
5. In an action upon a judgment, in case the judgment roll has been lost or destroyed, secondary evidence may be given of its contents. (*Mandeville* agt. *Reynolds*, 68 *N. Y.*, 528.)
6. It being the duty of the county clerk to have and keep the roll on deposit in his office (*Code*, *secs.* 281, 282), if it cannot be found in the particular place provided for such deposit, the presumption is that it is lost or destroyed. (*Id.*)
7. An attorney is not authorized by his retainer to satisfy a judgment without payment, or to compromise or release the same; nor can he settle a suit, and conclude his

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client in relation to the subject in litigation without consent of the latter. (*Id.*)

8. In an action under the Code, where the action or defense is based upon a judgment or other judicial record, the record may be attacked and impeached for fraud or for collusion, with knowledge and in disregard of the rights of the party attacking it; such party is not bound to resort to an action or proceeding direct for the purpose of avoiding the record. (*Id.*)

9. The language of the Revised Statutes in relation to the docketing and satisfaction of judgments (2 R. S., 361, sec. 26), to the effect that a judgment shall be deemed satisfied to the amount returned collected on an execution issued thereon "unless such return shall be vacated by the court," does not under the Code, require a vacation to be sought by motion or action directly to that end; and in action on a judgment, defended upon the ground of an entry of satisfaction, the satisfaction may be attacked for collusion or fraud, and a judgment for the plaintiff is as effectual a *vacatur* as if one had been obtained in a direct proceeding. (*Id.*)

10. In an action upon a judgment alleged to have been recovered by confession after proof that the judgment roll could not be found in the county clerk's office, the "judgment book" required to be kept for the county clerk for the entry of judgments (*Code, secs. 279, 280*) was produced, which contained an entry of a judgment in the supreme court in favor of plaintiff's assignor against defendant, as follows: "Judgment, October 4, 1853; on filing of this statement and confession it is adjudged by the court that the plaintiff do recover of the defendant the sum of \$2,346 damages, and five dollars costs." The clerk who entered the

judgment testified that he had no recollection of the case, but that he would have made no entry without some thing before him to found it on. The docket of judgments was also produced, in which the judgment was regularly entered. Plaintiff testified that, just prior to the date of said judgment defendant told him that he was about to make a confession of judgment in favor of said assignor on old matters, and it was proved that defendant afterwards recognized the judgment as existing and valid. *Held*, that the evidence was sufficient to establish that at the time of the entry in the judgment book there was a roll or statement, which authorized the entry of a judgment by confession, and that it was for money due. (*Id.*)

11. Also, *held*, that declarations of defendant that there had been a judgment confessed for a pre-existing debt were competent evidence. (*Id.*)

12. D., who had been the attorney of plaintiff in a former action to enforce the judgment after he had testified as a witness for plaintiff that he did not recollect that he had ever seen the roll, was shown certain letters written by him containing statements referring to the roll, to the facts stated therein, and to the affidavit of defendant attached thereto; these statements were read aloud in the hearing of the court and jury, without objection, and the witness was then asked if they were correct; this was objected to, overruled and exception taken. The witness answered that he supposed them correct at the time. *Held*, that the evidence was properly received; that the letters were to be considered as memoranda made at or near the time when the attorney became possessed of the facts narrated; and that it would have been permissible to have read those portions of the

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letters themselves in evidence. (*Id.*)

13. The assignment to plaintiff of the judgment was in 1854. Defendant proved an assignment of it from H., plaintiff's assignor to E., executed in 1855, to which plaintiff was a subscribing witness, and a satisfaction-piece from E., acknowledged in 1856; also an execution upon the judgment, signed by the attorneys who procured it, dated in 1867, upon which was indorsed a direction to the sheriff to return the same satisfied, signed by said attorneys, and a return in accordance with such direction signed by the sheriff; also an entry in the docket of judgments following the entry of the judgment as follows: "*fi. fa.* returned satisfied." Defendant also read in evidence an order entitled in an action by the plaintiff, against the defendant herein, dated in 1869, to the effect that upon filing stipulation of the attorneys for the parties, and upon their consent in open court, it was ordered that the entry of satisfaction of said judgment be ratified and confirmed. Plaintiff gave evidence showing that the second assignment was drawn by, and executed in compliance with the suggestion of, defendant, for the convenience of the parties, so that the assignee might act as plaintiff's agent to receive payment during plaintiff's contemplated absence, all the parties having knowledge of the prior assignment; that the assignee was not authorized to arrange the matter, save upon payment of the judgment in full; that plaintiff never authorized the issuing of an execution; that it and the indorsements upon it were in defendant's handwriting although signed by the attorneys of record, and that nothing was ever paid by defendant for the satisfaction of, or upon the judgment. *Held*, that the attorney had no authority to direct the return of the execution

unsatisfied, or to compromise and release the judgment, and the fact that the compromise was put into the form of a stipulation, and an order effected thereon, gave it no greater efficacy; nor had the second assignee authority to give satisfaction without payment in full. (*Id.*)

14. Also, *held*, that the satisfaction entered upon the docket of the judgment and the order entered upon the stipulation and consent of the attorneys could be impeached and avoided in this action. (*Id.*)

JUDICIAL NOTICE.

1. Courts cannot take judicial notice of the width of streets or of sidewalks in a city, or of the ordinances of the municipal corporation, establishing the same, defining the same, or prescribing and regulating their limits and extent. (*Porter* agt. *Waring*, 69 N. Y., 250.)

JUDICIAL SALES.

1. The assignee in bankruptcy of J. sold and conveyed all the right, title and interest of said bankrupt in a certain farm, in the city of New York. At the time of the adjudication in bankruptcy, the interest, if any, which J. had in the farm was an estate in remainder in an undivided share of the farm; said farm had been laid out into lots and avenues and streets. After the termination of the precedent estate, an action for partition was commenced, resulting in a decree whereby certain lots, part of said farm, were set off as J.'s share in severalty. The assignee in bankruptcy was not made a party to the partition suit; the sale made by him was after judgment therein. In an action of ejectment by the purchaser, it was

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- objected that the assignee should have sold in parcels, and should have sold the interest of J. in the lots allotted to him. *Held*, that, assuming the sale should have been similar to a sale under a decree in equity, silent as to the manner of sale, it could not be attacked collaterally and held absolutely void; also, that the assignee was not bound by the partition to which he was not a party; and if he did not elect to affirm it, he had the right to sell the undivided interest of the bankrupt. (*Smith* agt. *Schottz*, 68 N. Y., 41.)
2. The provision of the Revised Statutes (1 R. S., 739, sec. 147), declaring a grant of land void if, at the time, the land shall be in the possession of a person claiming an adverse title, does not apply to a judicial sale and conveyance thereunder. (*Id.*)
 3. A redemption by a creditor of lands sold upon execution made on or after the last day of the fifteen months from the day of sale, to be valid, must be made at the office of the sheriff of the county in which the sale took place; if made at another place, although in the same village and to the sheriff who made the sale, it is invalid. (*Morse* agt. *Purvis*, 68 N. Y., 225.)
 4. A sale was made January 16, 1869; *held*, that April 16, 1870, was the last day for redemption. (*Id.*)
 5. As to whether a purchaser at a judicial sale will be compelled to take a title depending upon adverse possession and parol proof to support it, *quære*. (*Mott* agt. *Mott*, 68 N. Y., 247.)
 6. Where a tract of land, divided into city lots, is put up and sold in separate and independent parcels, a defect in the title to one parcel or to a lot included therein, will not avoid or affect the sale of another parcel; but a defect in the title to any one of several lots put up and sold as one parcel, avoids the sale of the whole parcel. (*Id.*)
 7. The owners of certain agricultural lands across a portion of which was a private lane leading from a highway to a dwelling-house thereon, conveyed to V. a portion of the lands adjacent to, and south of, the lane. The deed bounded the premises conveyed by courses and distances, which did not include the lane, nor was it required to give the quantity of land conveyed. The lines ran "to the side of" the lane and "along the same." The deed also granted the privilege of using, from time to time and at all times forever hereafter, the said lane, the grantee "bearing and paying in common with the grantors * * * his proportionate part of keeping the said lane in repair." The grantors subsequently conveyed the land north of the lane. They retained a portion of their land to which the lane gave access, and the use of it was continued for over thirty years, when the lands were divided into city lots and streets, and the necessity for the use of the lane ceased. The lane was never necessary to the convenient occupation of either of the parcels of land granted. M. subsequently acquired title to all the lands adjoining the lane on both sides thereof, and upon judicial sale, they were put up in parcels, in some of which the lane was included. The sales were of the fee. Upon appeal from orders requiring the purchasers to complete their purchases, *held*, that grant of the easement in the lane, in the light of the surrounding circumstances, showed an intent to limit the fee granted to the land outside the lane; that the fee of the lane remained in the grantees, subject to the easement; and that the sales of the parcels which included portions of the lane were

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invalid because of the defect in title. (*Id.*)

8. The lands of M. adjoined "the Bloomingdale road" on the west. The sale was made after the passage of the act of 1867 (*chap. 697, Laws of 1867*) closing the Bloomingdale road, and in terms vesting the title of the fee of the road to the center thereof in the owners in fee of the adjoining lands. After the passage of said act, M. entered upon, and took possession of, the westerly half of said road adjoining his premises. Two lots were sold separately, which were described "as forming the westerly half of the Bloomingdale road, then closed." The sale was "of the estate, right, title and interest" of M., therein. *Held*, that whether the title to said lots were valid or not, was immaterial upon this appeal, as the purchaser, by a deed "of the right, title and interest" of M., would get precisely what was offered, and all that was offered to be sold; and that the purchaser was properly required to complete his purchase. (*Id.*)

9. The act of 1876, entitled "An act relating to the expenses of judicial sales in the county of Kings" (*chap. 439, Laws of 1876*), is a local bill within the meaning of the constitutional provision (*art. 3, sec. 16*), providing that no private or local bill shall contain more than one subject which shall be expressed in the title. (*Kerri-gan agt. Force, 68 N. Y., 381.*)

10. The first section of said act providing that all sales upon judgments or decrees, with certain exceptions, shall be made by the sheriff, is embraced within the subject expressed in the title. (*Id.*)

11. Section second of said act prescribing the fees of the sheriff is not violative of the constitutional provision (*art. 3, sec. 18*), prohibiting the passage of a private or local

bill increasing the fees of public officers during their term of office; as it does not in terms apply to the sheriff then in office, and may lawfully operate to affect the compensation of future sheriffs, it will be presumed that such was the intention. (*Id.*)

12. When purchaser at judicial sale, will not be compelled to complete purchase because of defect in service of summons. (*See Smith agt. Wells, 69 N. Y., 601.*)

JURISDICTION.

1. The A. and G. W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to one M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. The same receiver was appointed in each state. An application was made in the New York suit by the plaintiff, as creditor, for relief as against the receiver. Such application was opposed upon the ground, among others, that the principal suit was in Ohio; that the suits in New York and Pennsylvania were auxiliary only thereto, and that the relief against the receiver could properly be obtained only in the Ohio suit:

Held, that the objection was untenable. The proceedings in each of the states were independent, so far as they related to the property within its limits, and the relief asked for might be obtained in the New York suit without intrrenching upon or conflicting with the orders or decisions found to be within the province of the court of the state of Ohio. (*Matter of United States Rolling Stock Co., ante, 286.*)

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- and magistrates must affirmatively appear. (*Matter of Travis, ante*, 847.)
3. A statement that any act has been regularly or duly done is not sufficient; the preliminary steps must be stated so that it can be seen that all was due and regular. The liberty of the citizen cannot depend upon the declaration of the magistrate that he has done all that the law requires, but upon the actual performance of those duties. (*Id.*)
 4. It is not necessary, in order to give jurisdiction to issue an attachment under the Code (sec. 227), that the affidavit should state specifically that a summons has been issued or served; a statement that an action has been commenced is sufficient. (*Wallace agt. Castle*, 68 N. Y., 370.)
 5. To authorize the issuing of an attachment it is not necessary that a summons shall have been served; for that purpose "an action shall be deemed commenced when the summons is issued" (*Code, sec. 227, as amended in 1866*). (*Id.*)
 6. The supreme court has power to overlook or relieve from a violation of, or a non-compliance with, its rules, and may permit an act to be done after the time prescribed by such rules. (*Martine agt. Lowenstein*, 68 N. Y., 456.)
 7. The power to punish as for a contempt the disobedience of an order granted by a county judge in proceedings supplementary to execution issued upon a judgment debtor to appear and answer concerning his property, does not vest exclusively in the county judge; the supreme court has concurrent jurisdiction and power to punish. (*Tremain agt. Richardson*, 68 N. Y., 617.)
 8. A justice of the peace, in an action regularly brought before him to recover a penalty for less than \$200, has jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty; and his judgment, so long as it remains unreversed, is conclusive between the parties upon every question necessarily embraced therein. (*Hallock agt. Dominy*, 69 N. Y., 288.)
 9. Process regularly issued upon such a judgment, authorizing the imprisonment of the defendant therein, is a protection in an action for false imprisonment to the officer executing it and to the parties at whose instance it was issued and served. (*Id.*)
 10. Under the act of 1869 (*chap. 520, Laws of 1869*), "authorizing the canal appraisers to hear the claim of P. V. and another, for damages sustained in the draining of Cayuga marshes * * * by the appropriation of their land to deposit the rock and shale taken from Seneca river, said P. V. presented a claim for land so appropriated, and in a separate item a claim for "damages done by fire." The appraisers awarded a sum for damages to the land, and also two items "for destruction of rails and fences," and for "destruction of timber." In proceedings by *mandamus* to compel the auditor to draw his warrant for the amount of the award, it appeared that the timbers, fences and rails destroyed were not upon the land appropriated, but upon other portions of the claimant's farm; the timber, however, was destroyed by fire negligently set by men employed upon the work. *Held* (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting), that when the appraisers had determined the amount to be awarded for the appropriation of the land, all their power under the act was exercised, and their award as to the other items was void. (*People ex rel. agt. Schuyler*, 69 N. Y., 242.)

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11. To complete the substituted service of a summons under the Code (sec. 135), where the order authorizing such a service directs the mailing of a copy of the summons and complaint to the person to be served at his place of residence, which is specified in the order, a publication of the summons and a deposit in the post-office, addressed as required by the order, is necessary, or in lieu thereof, a personal service out of the state. (*Smith* agt. *Wells*, 69 *N. Y.*, 600.)

12. Where, therefore, in such case, a copy of the summons and complaint is mailed and addressed to the defendant at a different place from that stated in the order, and there is no personal service and no appearance of the defendant, the court acquires no jurisdiction; a judgment against such defendant is void; and a purchaser at a sale of real estate thereunder cannot be compelled to complete his purchase, where the defendant so defectively served has a definite interest, however small, in the land sold. (*Id.*)

JUROR.

1. During a trial, the court having adjourned, one of the jurors, who lived twelve miles from the court-house, asked the plaintiff to let him ride home with him. The plaintiff assented and the juror rode with him about ten miles, in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused, if defendant's counsel so desired. Defendant's counsel stated he was willing to

leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would, in any event, have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof. (*Gale* agt. *N. Y. Central and H. R. R. Co.*, 13 *Hun*, 1.)

JUSTICE OF THE PEACE.

1. A justice of the peace may amend his *mittimus* after a defendant has been imprisoned on it. (*Matter of Hogan*, ante, 458.)

2. A *mittimus* issued by a police justice or a justice of the peace on a conviction for petit larceny, which simply states the offense, conviction and judgment thereon, without averring the jurisdictional facts, is sufficient. (*Id.*)

3. By section 85 of chapter 125 of 1849, conferring the same jurisdiction upon justices of the peace in the city of Brooklyn, in said city, as justices of towns have by law in respect to the towns, the legislature intended to restrict the territorial jurisdiction of the justices to the city itself. (*Geraty* agt. *Reid*, 13 *Hun*, 313.)

4. A justice of the peace, in an action regularly brought before him to recover a penalty for less than \$200, has jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty; and his judgment, so long as it remains unreversed, is conclusive between the parties upon every question, necessarily embraced therein. (*Hallock* agt. *Dominy*, 69 *N. Y.*, 238.)

5. Process regularly issued upon such a judgment, authorizing the imprisonment of the defendant therein, is a protection in an ac-

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tion for false imprisonment to the officer executing it and to the parties at whose instance it was issued and served. (*Id.*)

JUSTICE'S RETURN.

1. Upon an appeal to the county court from a judgment of a justice of the peace, the truthfulness of the justice's return, if it be fully responsive to the notice of appeal, cannot be questioned nor controverted by affidavits, nor can a further return, as to the truth of matters in respect to which the original return is controverted by affidavits be required. (*Barber* agt. *Stettheimer*, 13 *Hun*, 198.)
2. If the return be false, the remedy of the party aggrieved thereby is by an action against the justice. (*Id.*)

LACHES.

See MORTGAGE.

Costello agt. *Moade*, *ante*, 356.

See CONSOLIDATION OF ACTIONS.

The Eleventh Ward Savings Bank agt. *Hay*, *ante*, 438.

LANDLORD AND TENANT.

1. Where the complaint, in an action to recover rent, alleged a leasing for a term of seven years, *held*, that it was competent to prove a verbal lease for that term or for a shorter period; also that, if this was not so, the court at special term, on motion for new trial on the judge's minutes made after judgment, could allow an amendment conforming the pleadings to the proof. (*Thomas* agt. *Nelson*, 69 *N. Y.*, 118.)
2. Plaintiff in such an action offered in evidence a memorandum signed by himself, stating in substance that he was to give a lease to defendant for seven years; no rent was specified. *Held*, that this did not preclude him from proving the agreement by parol, as the memorandum was not itself the contract. (*Id.*)
3. *It seems* that a parol lease, void under the statute of frauds because for a longer period than one year, is not valid for that period. If the tenant enters and occupies under it he may be compelled to pay for the use and occupation, but cannot be compelled by virtue of the lease to pay for a period longer than he actually occupies. (*Id.*)
4. Defendant moved away from the premises, and sent the keys of the building to plaintiff in a letter; these were not returned. *Held*, that the retention of the keys was not an acceptance of the surrender of the premises; that plaintiff was not bound to tender a return. (*Id.*)
5. There was a defective flue in the building, making the occupancy uncomfortable and inconvenient. Defendant complained thereof, but continued to occupy until an arrangement was made by which he agreed to repair the flue at plaintiff's expense. *Held*, that defendant could not thereafter abandon the premises on account of the flue without making reasonable efforts to repair it. (*Id.*)
6. Plaintiff alleged in his complaint that he assigned the rent for two months to M., who thereafter re-assigned to him; no proof of the transfers was made. Defendant's counsel requested the court to charge that plaintiff could not recover for the two months, which was refused. *Held*, no error. (*Id.*)
7. *It seems* that a judgment taken by default in summary proceed-

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ings by a landlord for non-payment of rent is conclusive in an action by the landlord to recover rent, as to the existence and validity of the lease, the occupation by the tenant, and that some rent is due and unpaid; but it is not conclusive as to the amount of rent due, although it is alleged in the affidavit upon which the proceedings were instituted. (*Jarvis* agt. *Driggs*, 69 N. Y., 143.)

8. The plaintiff, however, upon such proof, is entitled at least to nominal damages, and where upon the trial the only question raised is as to his right to recover any thing, an exception to a decision thereof in favor of plaintiff does not present for review any question as to the amount. (*Id.*)
9. When tenant not estopped from setting up after-acquired title in opposition to title of landlord. (*See Hetzel* agt. *Barber*, 69 N. Y., 1.)

LATENT EQUITIES.

1. The general rule that a purchaser of a mortgage takes it subject to all latent equities existing in favor of the mortgagor, and also of third parties, relates only to those equities which are not within the scope of the recording act, and against which subsequent purchasers, *bona fide*, are thereby protected. (*Mutual Life Insurance Co.* agt. *Wilcox*, ante, 48.)

LEASE.

See USE AND OCCUPATION.

Kiersted et al. agt. *Orange and Alexandria R. R. Co. et al.*, ante, 51.

LEVY.

1. A sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife.

Held, that the act of the sheriff in levying upon the property was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property. (*Alvord* agt. *Haynes*, 18 Hun, 26.)

2. That his liability was not affected by the fact that he claimed to levy upon, and advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein. (*Id.*)
3. The facts that the plaintiff, in the judgment, directed the sheriff to get the executions, and consulted and advised with him and approved of his making the levy, are sufficient to sustain a verdict against him. (*Id.*)

LIEN.

1. One Robertson entered into a contract with the defendant, a railroad company, to construct forty-seven miles of its road, and thereafter entered into a contract with one McGraw, by which the latter agreed to construct a portion thereof. Subsequently, McGraw having failed to pay his laborers and others who had furnished materials, the latter filed notices as provided by section 4 of chapter 402 of the Laws of 1854, as amended by section 1 of chapter 529 of 1870, and to foreclose these this action was brought against the company and McGraw. At the time the notices were filed nothing was due to McGraw.

Held, that as nothing was due to McGraw at the time the notices were filed, the company were not liable to pay the amounts therein set forth.

That, to render the company liable, it must also be shown that it was, at the time of the filing of the notices, indebted to Robertson on its contract with him. (*Samp-*

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son agt. *Buffalo, N. Y. and P. R. Co.*, 13 *Hun*, 280.)

LIMITATION.

1. The policy of insurance contained a clause providing that the company should only be liable for any deficiency that might remain after the plaintiff had exhausted the primary security, which clause, on action brought, was stricken out. The policy also provided that no suit or action for the recovery of any claim by virtue of the policy should be sustainable in any court, unless it was brought within twelve months after the loss had occurred.

Held, that the clause in the policy as written, requiring the primary security to be first exhausted, was inconsistent with such a provision, and that it did not, therefore, apply to the case of insurance of the interest of a mortgagee; that under the contract, as it was claimed to be by plaintiff, the cause of action did not accrue until the entry of the judgment reforming the policy. (*Hay agt. Star Fire Insurance Company*, 18 *Hun*, 496.)

2. A plea of the statute of limitations of another state or country, where a contract was made, is no bar to an action brought upon the contract; the *lex fori* governs. (*Milner agt. Brenham*, 68 *N. Y.*, 83.)
3. A bank is not liable upon a certificate of a deposit until after demand of payment; and, therefore, the statute of limitations does not begin to run against it until demand is made. (*Howell agt. Adams*, 68 *N. Y.*, 815.)

MANDAMUS.

1. A writ of *mandamus* will be refused, when there is an adequate remedy at law. But when a duty

is plainly and flatly enjoined by law upon a public officer, he may be compelled by *mandamus* to do it. (*People ex rel. Stager agt. Starr*, *ante*, 888.)

2. A *mandamus* is the appropriate and proper remedy by a supervisor of a town, to compel the county treasurer to sue the bond of his predecessor, for not paying over school moneys as required by section 11 of chapter 567 of Laws of 1875. (*Id.*)

3. Where the *mandamus* applied for is to compel official action, if the statute requires such action, the relief must be granted. (*Id.*)

4. Upon an appeal by a claimant to the canal board from a decision of the canal appraisers, the latter refused to make a return to the appellate tribunal, on the grounds, first, that the appeal was not taken in time; and, second, that the relator had settled his claim and given a release in full therefor.

Held, that both of these questions were to be considered and decided by the appellate tribunal, and not by the canal appraisers, and that a *mandamus* should issue compelling the appraisers to make the required return. (*People ex rel. Freer agt. Canal Appraisers*, 18 *Hun*, 64.)

5. A resolution, presented to the board of supervisors of Queens county, authorizing the town of N. to borrow money to purchase, for public use, a plank-road in the town, received the vote of a majority of the members present; the chairman declared it lost, because it failed to receive a two-thirds vote, and the clerk recorded the ruling. *Held*, that a *mandamus* was properly granted, directed to the chairman and clerk, requiring them to convene the board, and requiring the chairman to declare the resolution carried, and the clerk to so record it, &c.; that,

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while the writ might have been directed to the board, it was not error that it was not so directed; but, *held*, that as the clerk in making the entry simply acted in the performance of his duty to record correctly what took place, the allowance of costs against him was error. (*People ex rel. agt. Brinkerhoff*, 68 N. Y., 260.)

6. A writ of *mandamus*, upon the application of one claiming title to an office, will not be granted, for the purpose of determining the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office; and this, although the attorney-general refuses to bring an action in the nature of a *quo warranto*. (*In re Gardner*, 68 N. Y., 467.)

7. The clerk of a board of supervisors has no authority to direct or control any of its proceedings, and a *mandamus* will not be granted, directed to and requiring him to recognize the relator as a member of the board, and to record his vote as such. (*Id.*)

8. The award of canal appraisers, while they keep within their jurisdiction, cannot be attacked collaterally for mere errors of judgment; but they are officers of very special and limited jurisdiction, and where they have acted without or in excess of their jurisdiction, this may be shown in avoidance of the award in proceedings by *mandamus* to enforce it. (*People ex rel. agt. Schuyler*, 69 N. Y., 242.)

9. Under the act of 1869 (*chap. 520, Laws of 1869*), "authorizing the canal appraisers to hear the claim of P. V. and another," for damages sustained in the draining of Cayuga marshes * * * by the appropriation of their land to deposit the rock and shale taken from Seneca river, said P. V. pre-

sented a claim for land so appropriated, and in a separate item a claim for "damages done by fire." The appraisers awarded a sum for damages to the land, and also two items "for destruction of rails and fences," and "for destruction of timber." In proceedings by *mandamus* to compel the auditor to draw his warrant for the amount of the award, it appeared that the timbers, fences and rails destroyed were not upon the land appropriated, but upon other portions of the claimant's farm, the timber, however, was destroyed by fire, negligently set by men employed upon the work. *Held* (CHURCH, Ch. J., ALLEN and FOLGER, JJ., dissenting), that when the appraisers had determined the amount to be awarded for the appropriation of the land, all their power under the act was exercised, and their award as to the other items was void. (*Id.*)

10. Where an order of special term, quashing a return to a writ of alternative *mandamus*, and directing a peremptory *mandamus*, reversed by the general term, with liberty to the relator to demur or to take issue upon the allegations of the return, the order of general term is not appealable to this court; it is not a final order, nor does it affect a substantial right, and it is a matter of discretion. (*People ex rel. agt. Clyde*, 69 N. Y., 603.)

MARRIED WOMAN.

See GRANTOR AND GRANTEE.

Cashman agt. Henry, ante, 234.

1. This action was brought by the plaintiff, a daughter of David Quackenbush, deceased, against his executor, to recover for services rendered by her in attending upon her father during his last illness, she being then married and living with her husband. *Held*, that the husband, and not the

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- plaintiff, was the proper person to bring the action. (*Cyck* agt. *Quackenbush*, 13 *Hun*, 107.)
2. She also claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services, and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by her father. *Held*, that the simple presentation of an account containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute. (*Id.*)
 3. In an action against a married woman and her husband upon a bond executed by them, it is sufficient if the complaint allege the execution, and delivery thereof by the defendants to the plaintiff, and set forth a copy of the bond. It is not necessary that it should contain any allegation as to her separate property or business. (*Broome* agt. *Taylor*, 13 *Hun*, 841.)
- MECHANIC'S LIEN.**
- 1 The statutory lien afforded by the mechanic's lien law of 1875 is *strictis simi juris*, and can only be made effectual upon substantial compliance with its provisions in all matters in respect to which it had in express terms exacted positive and direct statements as to the particulars specially mentioned, as opposed to mere legal inferences from other matters more or less distinctly or indistinctly asserted, or directly or inferentially inferable from such as are stated. The statute must be strictly construed. (*Dugan* agt. *Brophy*, *ante*, 131.)
 2. The vendor under contract to sell and make advances to aid the vendee to erect a building upon the premises is not liable as *owner* under the act of 1875. (*Id.*)
 3. The notice under this act is defective where it fails to state "the terms, time given and conditions of the contract" of the plaintiff, made with the contractor, against whom, by the notice filed, claim is made for the alleged debt due the plaintiffs. (*Id.*)
 4. The statute in these special enactments as to the particulars required by the fifth section of the act of 1875 is not content with such legal inferences as might be drawn from facts stated in general terms, but exacts a *direct, precise and positive statement* of the following particulars, to wit: "That the demand made is in exclusion of all just credits and offsets;" "of the name of the person (as principal) by whom the lienor was employed or to whom he furnished the materials;" "of the terms, time given and conditions of the contract;" "and whether all the work or materials for which the claim is made has been actually performed or furnished, and if not, how much of it." (*Id.*)
 5. A notice under the mechanic's lien law, which does not conform strictly to the foregoing requirements, is defective, and renders any lien sought to be established, ineffectual and void. (*Id.*)
 6. The filing of a notice of lien by a material-man, creates no lien upon the premises described, where the party to whom the materials were furnished was erecting the buildings for the owner of the land, who had engaged to advance to the builder the moneys as the work advanced, there being nothing due upon the contract when

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the lien was filed and the builder afterwards abandoned the work, which was completed by the owner with his own means. (*Holley agt. Van Dolsen, ante, 383.*)

7. ROBINSON, J., in *Burbridge agt. Marcy* (54 *How.*, 446), followed. (*Id.*)

8. Where the builder had an equitable interest under the contract, and would be entitled to the premises upon complying with the terms of a contract with the owner, which he never did, *held*, that, in action by the owner of the land to foreclose the interest of the builder, the persons filing the notices of lien and making adverse claims to the owner were proper parties. (*Id.*)

9. There can be no lien unless the seller and the purchaser both understand at the time of the delivery, that the materials were to be used upon a particular building, which the purchaser intended to construct, alter or repair. (*Watrous agt. Elmendorf et al., ante, 461.*)

10. The complaint must show that materials were furnished *for*, as well as used *in*, the building covered by the lien. (*Id.*)

11. The death of the contractor will not prevent a subcontractor from filing a valid lien. (*Id.*)

12. It is not necessary to set out in the complaint a recital of all that is contained in the claim filed with the county clerk. It is sufficient to allege, generally, that the plaintiff had filed the notice mentioned in the fifth section of the act (*lien law of 1875*), without specifying all the details which ought to have been stated in that notice. (*Id.*)

13. Where materials are furnished for and are used indiscriminately in the erection of several contigu-

ous buildings they may for the purposes of a mechanic's lien be regarded as one building and but one notice of lien need be filed covering all. (*Hall agt. Sheehan, 69 N. Y.*, 618.)

14. Under the lien law of 1862 (*chap. 478, Laws of 1862*), services of notice of the lien upon the owner of the land is not necessary to validate the lien; the lien is created by "filing the notice" (*sec. 1*), and all that is required by way of notice to enforce the lien is that notice shall be annexed to the complaint (*sec. 2*). The only object of service of notice upon the owner provided for by section 8 of said act, is to prevent payment by him to the contractor, etc., after service of notice. (*Id.*)

15. Plaintiff filed a lien for materials furnished for thirty houses; he released fifteen houses upon being paid the full value of the materials which went into those houses. *Held*, that his lien upon the remaining fifteen houses for the balance of his account was not affected by the release. (*Id.*)

MISDEMEANOR.

1. The act of 1863 (*Laws of 1863, chapter 172*) making it the duty of an overseer of the poor, of a town, to render an account to the town officers of such town, of all moneys received and disbursed by him, prescribes "no punishment" for the "willful neglect" of the duty thereby enjoined. The "willful neglect" of such duty is therefore a misdemeanor and punishable as such (3 *R. S.* [6th ed.], p. 988, *sec. 101*). (*Matter of Pickett, ante, 491.*)

2. The *mittimus* may be either in the name of the people or that of the justice awarding it, but the latter is the most usual. (*Id.*)

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MISJOINDER OF PARTIES.

1. *Misjoinder* of parties plaintiff is ground of *demurrer* to the complaint. (*Rumsey* agt. *Lake*, ante, 339.)
2. Where husband and wife unite in bringing an action, and the complaint shows that one alone must bring the action without the other, a *demurrer* will lie upon the ground that the complaint does not state facts sufficient to constitute a cause of action. (*Id.*)
3. An action for an assault and battery upon the person of a married woman must be brought in her name alone, and if the husband unite in bringing the action a *demurrer* will lie on the ground that the complaint does not state facts sufficient to constitute a cause of action. (*Id.*)
4. The correct rule seems to be that if there is a misjoinder of parties, or, in other words, if the facts stated in the complaint show no cause of action against the defendant in favor of one of the plaintiffs, the defendant may demur, under subdivision 6 of section 144 of the Code, as to such plaintiff upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and as to such plaintiff the complaint will be dismissed. (*Id.*)
5. Where it is claimed that there is a misjoinder of counts in an indictment because the first count charges a misdemeanor only, and the second count a felony, the proper remedy is to put the district attorney to his election, or to ask the court to give proper instructions to the jury as to their verdict; such misjoinder does not entitle the defendant to have the indictment quashed, except in the discretion of the court. (*People ex rel. Phelps* agt. *General Sessions*, 13 *Hun*, 396.)

MITTIMUS.

1. The act of 1863 (*Laws of 1863*, chapter 172) making it the duty of an overseer of the poor, of a town, to render an account to the town officers of such town, of all moneys received and disbursed by him, prescribes "no punishment" for the "willful neglect" of the duty thereby enjoined. The "willful neglect" of such duty is therefore a misdemeanor and punishable as such (3 *R. S.* [6th ed.], p. 983, sec. 101). (*Matter of Pickett*, ante, 491.)
2. The *mittimus* may be either in the name of the people or that of the justice awarding it, but the latter is the most usual. (*Id.*)
3. The magistrate is authorized to commit by statute, and as he is clothed with power to do the act, and does do it, there can be no reason why he should be compelled to insert in the body of the commitment that he acts by the authority of the people. (*Id.*)
4. A justice of the peace may amend his *mittimus* after a defendant has been imprisoned on it. (*Matter of Hogan*, ante, 458.)
5. A *mittimus* issued by a police justice or a justice of the peace on a conviction for petit larceny, which simply states the offense, conviction and judgment thereon, without averring the jurisdictional facts, is sufficient. (*Id.*)

MONEY PAID BY MISTAKE.

See ADMINISTRATOR.

Gulke agt. *Unlag*, ante, 484.

MORTGAGE.

1. Under the recording acts, all unrecorded instruments in writing by which any estate or interest in real estate is created, aliened,

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- mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, is void and of no effect as against any subsequent mortgagee, or assignee of a mortgage, who in good faith and for a valuable consideration takes a mortgage, or an assignment of a mortgage. Equity gives no assistance against a "purchaser" for a valuable consideration without notice. (*Mutual Life Ins. Co. agt. Wilcox, ante, 43.*)
2. A release of part of mortgaged premises is a "conveyance" by which the title to real estate may be effected, and unless duly recorded is void against a subsequent assignee of a mortgage for value, and without notice, under the recording act. (*Id.*)
 3. The general rule is that where the possessor of land causes the registry of a particular title, a subsequent purchaser need not look beyond it. The purchaser has a right to assume where the possessor has put his deed on record, that he has recorded all the conveyances affecting his title. (*Id.*)
 4. The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case is that the occupant is holding subject to the mortgagee. (*Id.*)
 5. The general rule that a purchaser of a mortgage takes it subject to all latent equities existing in favor of the mortgagor, and also of third parties, relates only to those equities which are not within the scope of the recording act, and against which subsequent purchasers, *bona fide*, are thereby protected. (*Id.*)
 6. The provisions of the act of 1833 (*Laws of 1833, chapter 279*), as to the filing of chattel mortgages, so far as they apply to *canal boats*, are superseded and replaced by those of the act of 1864 (*Laws of 1864, page 993*). (*Pickert agt. Canal Boat Independence, ante, 206*)
 7. The filing of a mortgage on a canal boat (or a true copy thereof) in the office of the auditor of the canal department (as required by the act of 1864) gives it preference over all claims but existing claims, and, of course, preference over the claims of subsequent purchasers and mortgagees. No other filing is necessary. (*Id.*)
 8. A person is not a purchaser in good faith where he purchases with notice of the prior mortgage. (*Id.*)
 9. The question as to what is sufficient notice to put a party on inquiry as to the existence of a valid mortgage *pointed out*. (*Id.*)
 10. A stockholder of a corporation knowing of the existence of a mortgage upon its property caused to be sold under an execution issued by him upon a judgment in his favor against the corporation, all the right, title and interest of the corporation in and to the property covered by the mortgage, "subject to whatever sum might be due upon the property by virtue of the mortgage," and himself purchased on the sale for a trifling sum.
Held, that the purchaser could not dispute the fact of the mortgage nor its validity. (*Conkling agt. Secor Sewing Machine Co. et al., ante, 269.*)
 11. Whether a corporation can itself join in the consent necessary to create a valid mortgage, under chapter 481, Laws of 1871, when the stock upon which its consent is based, has been pledged by it to a creditor as security for a debt, *quære?* Rights of pledgor and pledgee considered. (*Id.*)
 12. When an action for the foreclosure of a mortgage, made by a corporation, is pending in *another*

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- state, to which action a judgment creditor of the corporation is a party defendant, who has by his answer, interposed as a defense the invalidity of the mortgage, a court of equity in *this* state will not, upon the same grounds, disclosed in such answer, interfere by injunction at the creditors' instance, to enjoin the holders of the mortgage from prosecuting their action in another state, nor will it affirmatively decree the mortgage to be void. The question must be litigated in the action first brought. (*Id.*)
18. Equity disfavors a multiplicity of suits for the same substantial ends, and when full relief can be had in one action, another for the same object should not be allowed. Reasons for the application of such rules in this case, stated in the opinion. (*Id.*)
14. A satisfaction-piece of a mortgage purporting to be executed by the mortgagee, properly acknowledged, was filed in the register's office and the mortgage was marked satisfied of record; afterwards the mortgage was assigned by the mortgagee to a *bona fide* purchaser for a valuable consideration; afterwards the premises, covered by the mortgage, were purchased by a person, believing from the records that the premises were discharged from the mortgage.
- Held*, that the assignee of the mortgage could not enforce his mortgage against the premises, in the hands of such innocent purchaser, upon an allegation that the signature to the satisfaction-piece was a forgery, he not having, as soon as he discovered the alleged forgery, taken steps to correct the record or to enforce his mortgage; and that others, through the silence and inactivity of the plaintiff, were justified in dealing with the property as though the mortgage was properly discharged. (*Costello* agt. *Meade*, ante, 356.)
15. When a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists and acts on that inference, he shall be estopped from denying it (*Cornish* agt. *Abington*, 4 *Hurl & Norman*, 556). (*Id.*)
16. Effect of laches considered. (*Id.*)
17. In March, 1873, one R. was the owner of premises subject to a mortgage for \$3,000 held by one Aymar. R. desiring to raise more money, a mortgage for \$7,000 was executed to one Pardee, dated March 25, 1873, and recorded April 4, 1873, but Pardee having refused to make the loan the plaintiff agreed to advance the money and took an assignment of the mortgage from Pardee, dated April 16, 1873, and recorded April 17, 1873. The acknowledgment to this assignment, though regular upon its face was, in fact, taken by a notary public of New York county out of his county, to wit, in the state of New Jersey. Subsequently Aymar desiring to have his money a search was made by the Seaman's Savings Bank, which had agreed to furnish the money, and the Pardee mortgage discovered; thereafter by an arrangement between Pardee and R. the former executed a satisfaction-piece of the mortgage and an entry was made by the register to the effect that the same was discharged of record; the assignment to the plaintiff being then on record. Subsequently another mortgage was given upon the premises and the same was thereafter assigned to defendant H. In an action to foreclose plaintiff's mortgage it was claimed that the acknowledgment to the assignment from Pardee to plaintiff was void and its record was not notice to subsequent mortgagees.
- Held*, that the plaintiff having acquired title to the mortgage which was recorded, and the assignment and certificate of

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acknowledgment being in due form and recorded, notice was thereby given to all subsequent purchasers or mortgagees that he was the owner thereof, and his rights were not affected by the discharge of the mortgage by the Register:

That the recording of the assignment to plaintiff, as a *notice to subsequent mortgagees*, was not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York county, when his certificate was in due form and purported to have been taken in New York. (*Heilbrun agt. Hammond*, 18 Hun, 474.)

18. One Nelson, on October 13, 1874, in pursuance of an usurious agreement entered into between himself and the plaintiff, executed and delivered to it four bonds and mortgages. On February 19, 1875, he conveyed the property covered thereby to one L., subject to the mortgages. On March 15, 1875, L. conveyed the same, subject to the mortgages, to W., who, on March 23, 1876, reconveyed the premises to Nelson, the conveyance not being stated to be subject to the mortgages.

In an action brought to foreclose the mortgages, *held*, that Nelson, being the "borrower," and the mortgages being liens only upon his own property, was entitled to set up the defense of usury and have the bonds and the mortgages collateral thereto declared null and void.

Quare, whether, if any of the intermediate grantees of the property had become bound for the payment of the bond and mortgage, the mortgage might not be considered as collateral security for that liability, and enforceable with it. (*Knickerbocker Life Ins. Co. agt. Nelson*, 13 Hun, 321.)

19. One Benham conveyed certain real estate to one Pennock, and took back a purchase-money

mortgage for \$2,800, as to \$1,400 of which it was provided that, as Benham's wife had refused to join in the deed, it should be set apart as an indemnity against her claim of dower, the interest to be paid to Benham during his life, and in case he survived his wife, the principal to be paid to him or his heirs, executors or administrators; in case she survived him the interest to be paid to her during her life, if she elected to receive it instead of claiming her dower, and if not, then no interest to be paid until her death, but the principal to be paid within twelve months thereafter to the heirs, executors or administrators of Benham. Benham assigned the mortgage, and the same was paid and by the assignee satisfied of record. The wife survived the husband and elected to take the interest of \$1,400, instead of her dower. After her death the administrator of Benham brought this action, claiming that Benham had no right to assign the mortgage; that the \$1,400 therein reserved was made a trust fund for the benefit of Benham's heirs, and that the payment to the assignee did not satisfy the same.

Held, that the assignment by Benham was valid, and that the payment to the assignee satisfied and discharged the mortgage. (*Benham agt. Pennock*, 13 Hun, 103.)

20. In an action to foreclose a mortgage the costs are in the discretion of the court.

Where a referee in such a case decides that the plaintiff is only entitled to certain costs, his error, if any, can only be corrected by an appeal from the judgment, and not upon the motion. (*Lossee agt. Ellis*, 13 Hun, 656.)

21. A mortgage may be executed or a judgment confessed as security for future advances, to be made in pursuance of a contemporaneous agreement, and such mort-

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gage or judgment will be valid and effectual as against subsequent incumbrancers having notice thereof. All advances made after the attaching of a subsequent lien, by mortgage or judgment, are subject to the priority of the latter lien. The object for which the mortgage is given and the amount of the advances made may be shown by parol. (*Hall agt. Crouse*, 18 Hun, 557.)

22. Parol evidence is also admissible to show that the mortgage was given to secure advances to be made by a party not named in the mortgage. (*Id.*)

23. The English rule prohibiting attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in this state. (*Id.*)

MORTGAGE FORECLOSURE.

1. The A. and G. W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to one M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. The same receiver was appointed in each state. An application was made in the New York suit by the plaintiff, as creditor, for relief as against the receiver. Such application was opposed upon the ground, among others, that the principal suit was in Ohio; that the suits in New York and Pennsylvania were auxiliary only thereto, and that the relief against the receiver could properly be obtained only in the Ohio suit:

Held, that the objection was untenable. The proceedings in each of the states were independent, so far as they related to the property within its limits, and the relief

asked for might be obtained in the New York suit without intrenching upon or conflicting with the orders or decisions found to be within the province of the court of the state of Ohio. (*Matter of United States Rolling Stock Company*, ante, 286.)

2. It is the duty of the court to distribute moneys received at judicial sales. After moneys have been paid into the hands of court's officers, the court must see that they reach those entitled to them. The court, and not a referee appointed to execute the judgments of foreclosure, must determine the priority of liens. (*Eleventh Ward Savings Bank agt. Hay*, ante, 444.)

3. If liens be equal in rank, the power of the court to protect that equality is not impaired by any error which a referee may have fallen into in making a sale. (*Id.*)

4. If fraud, misconduct, surprise, or well grounded misapprehension has prevented the sale of the property for the price that ought to have been obtained, or if for any other reason it should be inequitable to permit the sale to stand, a resale will be ordered. (*Id.*)

5. But where no one applies for a resale, and where all parties are content that the sale shall stand, and where justice can be done without a resale, the court will not order one of its own motion. (*Id.*)

6. Where three actions were each commenced to foreclose a separate mortgage of equal date, lien and time of record and amount of purchase-money upon the same parcel of land, said three mortgages having been originally made to secure the separate amounts due to each of the joint grantors of said lands. The actions were numbered 1, 2 and 3. Three separate judgments have been entered, all of which bear date November

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20, 1876, and filed on November 22, 1876. The referee appointed in and by said judgments to sell the mortgaged premises, on the day advertised for said sale, offered the same for sale under the judgment in action No. 1, and the premises were sold for \$34,500. Afterward the same premises were offered for sale under judgment No. 2, and were struck off to the same purchaser for \$250, and immediately thereafter the same premises were again offered for sale by the referee under judgment No. 3, and were struck off to the same purchaser for \$250. On petition of one of the sureties for the payment of said mortgaged debt, asking that an order be made in said actions directing the referee to apply the amount of the proceeds of the sales under said judgments proportionably to each:

Held, first, that, no one of the mortgages had any priority over the others, and the referee should not be permitted to give precedence to one of the judgments, simply because he finds it marked No. 1. The court itself had no power to give that judgment or that mortgage priority.

Second, It is the duty of the court to protect the equality of liens where it exists, and, in performing that duty, the court will look behind the proceedings of the referee to the transaction out of which the liens arose.

Third, These three mortgages being equal liens, equity requires that the money received at the sale should be divided among them proportionably.

Fourth, The sureties are entitled to make the petition. The plaintiff could demand such a division, and the sureties, by right of subrogation, may demand it likewise. They are bound by the judgments in these actions, and on paying the mortgage debt to the plaintiff they will become entitled to all the securities for that debt which the plaintiff possesses.

Fifth, Although the petitioner

has not paid the debt, he is liable to pay it, and "the same equity which enables a surety, after payment by himself, to recover the amount from his principal, warrants him to file a bill to compel payment by the principal, when he has been brought under liability, by the debt falling due, though he may not have been actually sued." Under this principle, the petitioner is not prematurely applying for relief. (*Id.*)

MOTIONS AND ORDERS.

1. *It seems* that an order, in proceedings for the sale by a general assignee in bankruptcy of the property of the bankrupt, directing the sale of the right, title and interest, &c., of the bankrupt, is sufficient; it is not necessary that it should direct the sale of the right, title and interest which the assignee acquired by the decree in bankruptcy. (*Smith* agt. *Schotts*, 68 N. Y., 41.)
2. Where a question of fact arising upon a motion is referred, as authorized by the Code (*sec.* 27), the court has no authority to allow disbursements in addition to ten dollars costs of motion. (*Concklin* agt. *Taylor*, 68 N. Y., 221.)
3. A motion by an assignee of a judgment to vacate a satisfaction thereof, executed by the judgment creditor after assignment, is addressed to the discretion of the court; it may hear and determine the motion on the merits, or may compel the judgment debtor, in order to contest the validity of the judgment and the right of the claimant to collect the amount thereof, to bring an action for that purpose; and the exercise of this discretion cannot be interfered with by this court. (*Id.*)
4. The disbursements upon such a motion are not costs in an interlocutory proceeding, within sec-

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- tion 311 of the Code, and no provision is made by the Code for their allowance. (*Id.*)
5. An attachment cannot be demanded as matter of right; and whether in a particular case it should issue is within the discretion of the court; an order, therefore, refusing the writ is not reviewable here. (*Sartwell* agt. *Field*, 68 *N. Y.*, 341.)
 6. Upon application made by the attorney-general under the act of 1853, in reference to life insurance companies (*sec. 17, chap. 463, Laws of 1853*), for the dissolution of a life insurance company, an order of reference to take proofs touching the application was granted. The motion was opposed upon affidavits to the effect that the corporation had already been dissolved by a judgment in an action brought under the provisions of the Revised Statutes (2 *R. S.*, 464, *sec. 39*), providing for proceedings against corporations in equity, in which action a receiver had been appointed. *Held*, that the order did not involve a decision as to the effect of the judgment or the rights of the parties; that it was simply an interlocutory, not a final order; that it did not affect a substantial right; and, therefore, was not reviewable here. (*In re Atty.-Gen. agt. Conth. L. Ins. Co.*, 68 *N. Y.*, 343.)
 7. Where an order of general term reversing a judgment entered upon the report of a referee does not state that the reversal was upon questions of fact, unless some error of law appears in the case, the order cannot be sustained in this court; the evidence cannot be looked into here for the purpose of ascertaining whether the general term should have reversed on the ground that the findings of fact were against the weight of evidence. (*Poster* agt. *Persch*, 68 *N. Y.*, 400.)
 8. An objection to evidence, taken under a commission, that the commission was not executed by the person intended, should be raised by motion to suppress where the party has an opportunity so to do; if not so raised it will be deemed to have been waived; it cannot be raised, upon the trial, where the party had knowledge of the fact a sufficient time before the trial to enable him to make the motion. (*Newton* agt. *Porter*, 69 *N. Y.*, 133.)
 9. An order of general term reversing a judgment entered upon a decision of the court on trial without a jury, which order does not direct a new trial and upon which no judgment has been entered, is not reviewable in this court; it is not an order granting or refusing a new trial, nor is it a final judgment. (*Rust* agt. *Hauselt*, 69 *N. Y.*, 485.)
 10. Where an order of special term quashing a return to a writ of alternative *mandamus* and directing a peremptory *mandamus*, is reversed by the general term, with liberty to the relator to demur or to take issue upon the allegations of the return, the order of general term is not appealable to this court; it is not a final order, nor does it affect a substantial right, and it is a matter of discretion. (*People ex rel. agt. Clyde*, 69 *N. Y.*, 603.)
 11. A notice of motion to dismiss an appeal to this court is not fatally defective because of an omission to specify therein upon what papers the motion will be made; the nature of the motion apprises the appellant that it is based upon the record. (*Browns* agt. *Taylor*, 69 *N. Y.*, 627.)

NEGLIGENCE.

1. To maintain an action for personal injury occasioned by the negligence or want of care of

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another, it must be made to appear that the defendant owed some duty or obligation to the party injured which he failed to discharge or perform. Unless there is some contract, duty or services which a party is bound to fulfill, there can be no negligence, fault or breach of the obligation. (*McAlpin* agt. *Powell*, ante, 163.)

2. The deceased was a bright, intelligent boy, nearly ten years of age, living with his father, who, with his family, occupied the upper story of defendant's tenement-house, and used the room, the window of which opened on the fire-escape, for working at his trade as a shoemaker. The boy, immediately previous to the accident, sat on the window-sill, the window being open, and being about fifteen inches from the floor, and about the same distance from platform of fire-escape. The deceased stepped on the platform of the fire-escape (the dimension of which was about eight by three and a half feet, and which had an iron railing around its outside), and passed to the end, where there was a trap-door and a ladder leading to the platform in the next story below. The hinges of the trap-door, which were rusted and only fastened with a small wire and a string, gave way, and he was precipitated below and killed:

Held, that the deceased had no right to go upon the platform, and was there for no legitimate purpose. It was not intended for any such use, and the act of the deceased in entering upon and passing along the platform was in violation of the purpose for which it was designed:

Held, further, that under such a state of facts, and where a person thus voluntarily exposes himself to danger and is injured, there is no rule of law which authorizes a recovery. (*Id.*)

3. The distinction between cases where an infant is injured while

lawfully in the highway, which it has the right to travel and use, and where he is palpably invading the premises of another, and is a mere trespasser at the time of the injury, pointed out and commented upon. (*Id.*)

4. The owner of a building rented to a tenant without a covenant that the landlord should keep the same in repair, is not responsible for damages occasioned by neglect to repair. (*Id.*)
5. Whether there was negligence of the tenant in not protecting the window with temporary grate or bars which exempted the defendant from liability, *quære*. (*Id.*)
6. The board of education was expressly created a corporation for all the purposes of the act creating it, with power to take and hold property, both real and personal, devised and transferred to it for the purposes of public education in the city of New York. (*Donovan* agt. *Board of Education*, ante, 176.)
7. An action will lie against the board of education of the city of New York for negligence in the execution of its corporate duties. (*Id.*)
8. It is made the duty of the board of education (by the statutes which created it) to have the safe-keeping of all premises used for public ward schools in the city of New York, and to examine the safety of all school premises, and to see that the same are kept safe and in good order.

Held, that an action will lie to recover damages for personal injuries sustained by plaintiff by falling into an unguarded opening extending from the yard of a public school building into the cellar of said building in consequence of the negligence of the defendant (the board of education) allow-

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ing the covering thereof to be left open. (*Id.*)

9. Where the complaint alleged that the defendant was a corporation created by, and existing under, the laws of the state of New York, and that as such it was not only its duty to see that the school premises in question were kept safe and in good order, but also that it occupied and had the control and safe-keeping of the same, with the appurtenances, &c., &c.:

Held, that these allegations sufficiently aver the legal capacity of the defendant to be sued, and as they are expressly admitted by the answer, the defendant is not in a position to insist that the duty averred rested upon, and the use and occupation in truth was by and in, the trustees of the ward in which the premises are situate, and that if there was any negligence, it was by an employee of the trustees of the ward, for whose act or omission the defendant is not responsible. (*Id.*)

10. A party who formally and explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission. (*Id.*)

NEW STATE CAPITOL.

1. It is provided by chapter 694 of Laws of 1875 (pages 809, 810) that all contracts for work to be done upon the new capitol shall be awarded to the lowest *bona fide* responsible bidder or bidders.

Held, that the statute requires the successful bidder to be a *responsible* one, that is "able to respond or to answer in accordance with what is expected or demanded," in addition to the giving of the bond for the faithful performance of the contract. (*People ex rel. Martin agt. Dorsheimer, ante*, 118.)

2. He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. (*Id.*)

3. Where the contracting board has passed upon the *pecuniary responsibility* of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere so long as there has been no abuse of discretion. (*Id.*)

NEW YORK (CITY OF).

1. A party is entitled to recover for labor performed and materials furnished in the repair of sewers, in the city of New York, previous to January 1, 1876, under an agreement to pay what they were reasonably worth and not under a contract fixing the price in advance of performance. (*Brown agt. The Mayor, ante*, 11.)

2. As the legislature by the act of 1875 recognized that of 1871 as still existing when the former was passed; as the city itself by its proper officers has by its practice down to January 1, 1876, declared that the latter act was still in force when the claim of the plaintiff accrued, which practice "has much of the weight of judicial decision," and as the performance of the work by contract was impracticable:

Held, that the act of 1871 was not repealed by chapter 335 of Laws 1873, entitled "An act to reorganize the local government of the city of New York," and that the plaintiff is entitled to recover. (*Id.*)

3. General and broad words requiring work to be done by contract should sometimes, depending upon the nature and character of the service, have a restricted meaning. (*Id.*)

4. Where the city has received the

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value of the claim in suit, a recovery should not be defeated upon the sole and only ground that its officers had misled a party performing honest labor, by causing it to be done in a manner prohibited by its charter. (*Id.*)

See ASSESSMENTS.

Methodist Episcopal Church of Harlem agt. *Mayor*, ante, 57.
Matter of Deering, ante, 296.
Matter of Van Buren, ante, 513.

See EQUITABLE ACTIONS.

The Mayor agt. *Union Ferry Company*, ante, 188.
The Mayor agt. *North Shore Staten Island Ferry Company*, ante, 155.

See NEGLIGENCE.

Donovan agt. *Board of Education*, ante, 176.

NON-RESIDENT.

See ATTACHMENT.

Garlock agt. *James*, ante, 806.

NONSUIT.

1. General usage, long continued and unquestioned, among public officers in matters pertaining to the discharge of their duties is of great force, and the practical construction thus given to the law has much of the weight of judicial decision. (*Brown* agt. *The Mayor*, ante, 8.)
2. The action is for work done for the city of New York in the repair of sewers, and was ordered by the commissioners of public works, under the act of 1871 (*chapter* 220). The defendant insisted that the act of 1871 was repealed by chapter 335 of the Laws of 1878; and that as the work had not been done by contract, as provided by section 91 of said latter act, the plaintiff could not recover. *Held*, that, as the city of New

York had had the benefit of the labor and materials of the plaintiff's assignor, and as they were worth the price charged (which was admitted on the trial), and as the city had paid a part of the claim, a nonsuit, even though it followed the statute, would do a grievous wrong.

Held, further, that, in view of the difficulty created as to the legislative intent in these various statutes (in relation to work to be done for the city of New York), upon which subject the practice of the city officers since 1873, and the character of the work done by the assignor of the plaintiffs, will throw great light, the proper course is to open the cause for the reception of additional evidence, so that every fact bearing upon the construction of these statutes, on which this action depends, may be fully considered. (*Id.*)

3. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit. (*Bickett* agt. *Taylor*, ante, 126.)
4. Where upon the trial of an action by a referee a motion is made on the part of defendant, at the close of the evidence, to dismiss the complaint, which is not passed upon at the time, and the referee subsequently makes his report with findings of fact adverse to plaintiff, and as a conclusion of law finds that the complaint be dismissed this cannot be considered the same as a non-suit, but as a disposition of the case upon a consideration of all the testimony (*Vanderlip* agt. *Keyser*, 68 *N. Y.*, 443.)

NOTICE.

1. Form of, under mechanic's lien law. (*Dugan* agt. *Brophy*, ante, 121.)
2. The question as to what is sufficient notice to put a party on

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- inquiry as to the existence of a valid mortgage *pointed out*. (*Pickert* agt. *Canal Boat Independence*, ante, 205.)
3. A defendant in an action to foreclose a mortgage may appear therein by attorney after judgment, and upon such appearance is entitled to notice of subsequent proceedings. (*Martine* agt. *Lowenstein*, 68 *N. Y.*, 456.)
 4. The sufficiency of a notice of appearance by a defendant in an action in the supreme court, is for that court to determine, and ordinarily cannot be reviewed here. (*Id.*)
 5. Publication of notice of the dissolution of a partnership in a newspaper, at the place where the business is carried on, is not sufficient to relieve a retiring partner from liability for subsequent transactions in the firm name with one having dealings with the firm prior to the dissolution; in such case notice must be brought home to the dealer, or it must appear that facts came to his knowledge sufficient to advise him or to give him reason to believe that a dissolution has taken place. (*Austin* agt. *Holland*, 69 *N. Y.*, 571.)
 6. The mailing of a notice of dissolution, properly directed to the party sought to be charged with such notice, is not sufficient alone to relieve the retiring partner; it raises a presumption of notice, but one which may be repelled by proof that the notice was not in fact received. (*Id.*)
 7. A notice of motion to dismiss an appeal to this court is not fatally defective because of an omission to specify therein upon what papers the motion will be made; the nature of the motion apprises the appellant that it is based upon the record. (*Brown* agt. *Taylor* [Mem.], 69 *N. Y.*, 627.)
 8. To produce papers on trial, presumptions against party refusing to comply with. (*See Caken* agt. *C. L. A. Co.*, 69 *N. Y.*, 300.)
 9. Of mechanic's lien, what necessary to validate lien. (*See Hall* agt. *Sheehan* [Mem.], 69 *N. Y.*, 618.)

NOTICE OF PROTEST.

1. When the indorser of note lives in a different place from that in which presentment or demand is to be made, personal service of notice of protest is not required, but the notice may be served on him by mail, although he lives in the same place with the holder who serves the notice. (*Wyman* agt. *Schappert*, ante, 156.)
2. Delivery to a city letter carrier of a notice of protest inclosed in an envelope, properly addressed and with postage prepaid, is good service by mail. (*Id.*)
3. Where a note held in New York was payable in Kutztown, Pennsylvania, and the holder placed it in a New York bank for collection, which sent it to its Pennsylvania correspondent, a bank at Allentown, within eighteen miles of Kutztown, whence it was sent to a bank at Philadelphia, and thence to a bank at Reading, and thence to Kutztown for presentment, where it was dishonored:
Held, that each agent for transmission of the note for collection, having indorsed it, was the holder for the purpose of receiving and giving notice of protest; and that the return of such notices by the same channel, each bank forwarding them by the next mail, was not an unnecessary and unreasonable delay which discharged the first indorser. (*Id.*)

OFFER.

1. Where an action is brought to set aside a contract, on the ground

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that the plaintiff was induced to enter into it through the fraud of the defendant, it is not necessary that the complaint should contain an offer to restore what has been received under it. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary. (*Hay* agt. *Hay*, 13 *Hun*, 815.)

ORDER.

1. It is a sufficient compliance with Rule 6 of the Rules of 1874, requiring the sheriff to file with the clerk the order of arrest and affidavits on which it was granted, and directing that a copy of the rule be indorsed on the order of arrest before its delivery to the sheriff, if the substance of the rule be indorsed upon the outside of the original papers given to the sheriff, although such indorsement be omitted from the copy of the papers served upon the person arrested. (*Kopelovich* agt. *Kersburg*, 13 *Hun*, 178.)
2. An order of the special term denying a motion for judgment on the ground of the frivolousness of a demurrer, is not appealable to the general term. Such an appeal is expressly forbidden by section 537 of the Code of Civil Procedure. (*Smith* agt. *Rathbun*, 13 *Hun*, 47.)

OVERSEER OF THE POOR.

1. The act of 1863 (*Laws* of 1863, chapter 172) making it the duty of an overseer of the poor, of a town, to render an account to the town officers of such town, of all moneys received and disbursed by him, prescribes "no punishment" for the "willful neglect" of the duty thereby enjoined. The "willful neglect" of such duty is therefore a misdemeanor and punish-

able as such (8 *R. S.* [6th ed.], p. 988, sec. 101). (*Matter of Pickett*, ante, 491.)

2. The *mittimus* may be either in the name of the people or that of the justice awarding it, but the latter is the most usual. (*Id.*)

PARTIES.

1. In an action on a policy of fire insurance, where the loss was payable to others than the party insured, the insured may be a proper and necessary party. In this case, though the loss was payable to others, from the nature of the insured's agreement with them, she having obligated herself to pay them an agreed price for the property insured and damaged by the fire, she had an interest in the subject of the action, and in obtaining the judgment demanded, and was properly joined as plaintiff (*Code of Procedure*, sec. 446.) (*Lasher* agt. *Northwestern National Insurance Co.*, ante, 324.)
2. Where the builder had an equitable interest under the contract, and would be entitled to the premises upon complying with the terms of a contract with the owner, which he never did, *held*, that in an action by the owner of the land to foreclose the interest of the builder, the persons filing the notices of lien and making adverse claims to the owner were proper parties. (*Holley* agt. *Van Dolsen*, ante, 338.)

See ADMINISTRATOR.

Gulke agt. *Uhlig*, ante, 434.

3. Upon the trial of this action, brought to foreclose a bond and mortgage, in which the defense was payment, the plaintiff having been subpoenaed to produce the bond was called as a witness and asked if he had it, to which he said he did not have it; that he did not have it in his possession

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when subpoenaed. The court then stated that the question was, whether he had control of it. After about an hour had been occupied by counsel in his efforts to find out where the bond was, the counsel for the plaintiff stated that he had it in his pocket, and being asked by the court if he would produce it said that he declined to do so at present, whereupon the justice ordered the complaint to be stricken out.

Held, that this was proper. (*Shepley* agt. *Morrison*, 13 *Hun*, 110.)

To action — the husband and not the wife is the proper party plaintiff in an action to recover for services rendered by the wife after her marriage. (*See Cuck* agt. *Quackenbush*, 13 *Hun*, 107.)

4. A plaintiff suing upon an assigned claim, is the real party in interest, under the Code, if he has a valid transfer as against the assignor and holds the legal title to the demand; the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. While such an inquiry may become material if the rights of creditors are involved or when some defense or counter-claim against the assignor is sought to be interposed. it constitutes no defense on the ground that the plaintiff is not the real party in interest. (*Sheridan* agt. *Mayor*, &c., 68 *N. Y.*, 30.)

5. A promise for a valid consideration by A. to B. gives no right of action to C., he being neither privy to the contract nor to the consideration unless it was made for his benefit and he was the party intended to be benefited; the fact that a benefit would inure to him from the performance is not sufficient. (*Simson* agt. *Brown*, 68 *N. Y.*, 355.)

6. Where an entry upon premises is

made by a husband, under claim of title, by virtue of a grant to himself and wife as joint tenants, and they continue in joint occupation thereof, the wife asserting a claim to the land and to the possession in her own right, she is properly joined with her husband and is a necessary party defendant in an action of ejectment. (*Stewart* agt. *Patrick*, 68 *N. Y.*, 450.)

7. It is for the state to make inquiry into an excess on the part of a religious corporation in its accumulation; to enable a person or other corporation so to do he must be in a position to claim an interest in the property if it is adjudged that the nominal owner may not. (*Rector*, &c., agt. *Rector*, &c., 68 *N. Y.*, 571.)

8. An action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by him of the corporate property, can only be brought by a stockholder in his own name after application to, and a refusal on the part of the corporation to bring the action. (*Greaves* agt. *Gouge*, 69 *N. Y.*, 154.)

9. In case of such refusal, the stockholder may bring an action for the benefit of himself and other stockholders, but must make the corporation a party defendant, alleging in his complaint, and proving the refusal. (*Id.*)

10. The fact that the wrongful acts of the officer have depreciated the market value of the capital stock held by the stockholder, to an extent greater than its share of the actual loss sustained, does not authorize an action by the stockholder in his own name without making the corporation a party, to recover the difference between the actual loss and the depreciation. (*Id.*)

11. Goods shipped under bill of lading to order of the shipper may

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be transferred by delivery of the bill of lading without indorsement. (*Mer. Bank* agt. *Un. R. R. and Tr. Co.*, 69 N. Y., 373.)

12. Under the Code the transferee of a bill of lading may bring an action thereon in his own name against the carrier. (*Id.*)
13. The firm of R. G. G. & Co. arranged with plaintiff for a credit of £10,000 sterling, in favor of their agents T. & Co., at Yokohama, to be availed of by the drafts of T. & Co., on plaintiff's London agents, who were to accept the drafts upon the hypothecation, by the drawers, of bills of lading of teas purchased by them for R. G. G. & Co. T. & Co. shipped to New York 672 packages of tea which were by the bill of lading deliverable to order of shippers. Plaintiff paid a draft accepted by its London agent on receipt from it of the bill of lading, invoice and consular certificate. The bill of lading was not indorsed by T. & Co. In an action upon the bill of lading, *held*, that the evidence authorized a finding that the bill of lading was delivered with intent to pass the title. (*Id.*) .

PARTITION.

1. Adam Muller left him surviving his widow and four children, to whom he bequeathed by will the rents and income of his real and personal estate, one-half to his widow and the other moiety to his children, until the youngest attained the age of twenty-one, when, in case of the survival of the widow, one-half of the realty was to be set apart, she to retain the income therefrom until her decease, the other half to be equally divided among the children in fee. In case of the death of the widow before the event mentioned, the whole of the realty to be equally divided in fee, when
- the youngest child attained the age of twenty-one years, an event, it is conceded, that has not yet happened. Action was brought by the guardian of the infant heirs for partition, and, after sale of their lands, motion is now made to compel the purchasers to take title:
Held, that the supreme court, as a court of equity, has no inherent original authority to direct the sale of the real estate of infants; and that the general provision of the statute declaring that "No real estate, or term of years, shall be sold, leased or disposed of in any manner against the provisions of any last will, or conveyance by which such estate was devised to such infant," was a prohibition upon the power of the court to decree partition and rendered the proceedings void *ab initio*. (*Muller* agt. *Struppmann et al.*, *ante*, 521.)
2. In an action for partition, in which one of the defendants was an infant, the complaint alleged that the land therein described was the only real estate owned in common *by the defendants*. The defendant demurred on the ground that it was not averred that the lands described in the complaint were the only lands owned in common *by the parties* as required by Rule 78 of the rules of 1876.
Held, that the demurrer was properly overruled; that if the allegation was defective it was because of its uncertainty and the remedy was by motion and not by demurrer. (*Moffatt* agt. *McLaughlin*, 13 Hun, 449.)

PARTNERSHIP.

1. Although the most conclusive proof is not required where defendants are sued as partners, there must be some proof of partnership. (*Gulke* agt. *Uhlis*, *ante*, 434.)
2. Where the only proof of partnership was the evidence of the plain-

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tiff who swore they were partners because "she knew it in business," "she had heard so," "everybody knew it," "and there was a sign on the store Uhlig & Co.," "she knew only two of the defendants, never saw and did not know the name of the third one," and which of the two defendants named Uhlig was the one she did not determine:

Held, that there was no direct evidence of defendants copartnership and no proper proof of reputation to that effect and the complaint should be dismissed for this reason. (*Id.*)

PENDENCY OF FORMER ACTION.

1. On July 7, 1875, the plaintiff herein commenced an action against the defendants upon an undertaking given by them. A demurrer interposed by them was overruled at the special term, but sustained upon an appeal to the general term; and on January 8, 1876, judgment was entered therein dismissing the complaint with costs. On February 17, 1876, this action was commenced by the same plaintiff against the same defendants upon the same cause of action. March 11, 1876, the plaintiff appealed, in the first action, from the decision of the general term to the court of appeals. March seventeenth the defendants served an answer in this action, setting up as a defense that another action was pending between the same parties for the same cause of action.

Held, that the plea referred to the time of the commencement of the action; that, at that time, the former action had been terminated by a final judgment upon the demurrer, and was no longer pending, and that the plea should, therefore, be overruled. (*Porter* agt. *Kingsbury*, 13 *Hun*, 83.)

2. *Semble*, that the defendant's

remedy was to apply for a stay of proceedings in this action, during the pendency of the appeal in the first. (*Id.*)

PERPETUATION OF TESTIMONY.

1. There is no way under the Code of Civil Procedure, or in the law of this state, *now* to perpetuate the testimony of a party defendant at *his own instance*. (*Montague* agt. *Worstell*, ante, 406.)
2. Under the Code of Civil Procedure any person can be examined conditionally before trial at the instance of either party to a suit. But a *party to an action* cannot be thus examined, excepting at the instance of the *adverse party*. (*Id.*)

See AMENDMENT TO SECTION 872.
Ante, 525.

PLEADINGS.

1. In an action for slander, an answer which merely avers as a defense that all the statements made by the defendant respecting the plaintiff are true, is bad. (*Robinson* agt. *Hatch*, ante, 55.)
2. Where the truth of the slander is relied upon as a defense, the particulars must be alleged. (*Id.*)
3. Where the words uttered are actionable *per se*, no allegation of malice in the complaint is necessary, because malice will be presumed. (*Id.*)
4. In such a case, although malice is alleged in the complaint, an answer setting up by way of a defense that the communications were privileged need not allege that they were made without malice. (*Id.*)
5. Where the complaint alleged that the defendant was a corporation created by, and existing under,

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the laws of the state of New York, and that as such it was not only its duty to see that the school premises in question were kept safe and in good order, but also that it occupied and had the control and safe-keeping of the same, with the appurtenances, &c., &c.:

Held, that these allegations sufficiently aver the legal capacity of the defendant to be sued, and as they are expressly admitted by the answer, the defendant is not in a position to insist that the duty averred rested upon, and the use and occupation in truth was by and in, the trustees of the ward in which the premises are situate, and that if there was any negligence, it was by an employe of the trustees of the ward, for whose act or omission the defendant is not responsible. (*Donovan* agt. *Board of Education*, *ante*, 176.)

6. A party who formally and explicitly admits, by his pleading, that which establishes the plaintiff's right, will not be suffered to deny its existence, or to prove any state of facts inconsistent with that admission. (*Id.*)
7. It is a fundamental rule in pleading that where there are separate counts in a complaint each must disclose a distinct right of action. The separate counts are for all purposes as distinct as if they were in separate declarations, and, consequently, they must contain all necessary allegations or the latter must expressly refer to the former. (*Victory Webb, &c., Mfg. Co.* agt. *Beecher et al.*, *ante*, 193.)
8. The complaint contains seven counts, and each of the counts is alleged as a separate and distinct cause of action. The defendants are sought to be held liable for certain indebtedness alleged to have been incurred by the Christian Union Publishing Company, and that corporation is not made a party. It is alleged in the fifth paragraph of the first count that

certain of the defendants were, for the first year of the existence of the corporation, its trustees, but there is no allegation of fact showing or tending to show why, as such trustees, the defendants, or either of them, should be held responsible for the debts of the corporation. On demurrer to the complaint:

Held, that the first six counts of the complaint standing alone fail to disclose any cause of action against those defendants who appear from either or any of said counts to have been trustees of the corporation which is alleged to be the debtor of the plaintiffs.

Held, further, that, unless there is something which can be construed as a general allegation referring to each and every of the first six counts, and connecting such general allegations with each of such counts, the demurrer must be sustained as to the several causes of action contained in those counts.

Held, also, that the twenty-first paragraph of the complaint, which is one of the subdivisions of the seventh or last count, which contains an allegation concerning the failure of the trustees to make and publish a report, does not in any way refer to the six preceding separate and distinct causes of action, and the demurrer as to these must be sustained (*Id.*)

9. The allegation in the seventh count, that the defendants were the trustees of the Christian Union Publishing Company, and that they had made default in filing their annual report, goes to show the liability of the defendants as trustees. (*Id.*)
10. It is averred in the seventh count that the machine was constructed under the direction of the corporation.
Held, that this is equivalent to a command that the machine should be constructed for the company by the plaintiffs, and

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therefore amounts at least to a request. (*Id.*)

11. The objection that the plaintiff's remedy upon the facts stated in the complaint is at law and not in equity may be taken at the trial, although not set up in the answer, if taken before the defendant has submitted to the equitable jurisdiction of the action by proceeding to the trial on the merits (*Pam* agt. *Vilmar* [54 *How. P. R.*, 235], as to this point, explained). (*De Bussiere* agt. *Holladay and others*, ante, 270.)

12. An omission to demur or answer for such cause is no waiver of the objection that the court has no jurisdiction of the action, or that a cause of action is not disclosed by the complaint. The term "jurisdiction" in such case explained. (*Id.*)

13. Where a complaint contains a cause of action it cannot be dismissed upon the ground that the plaintiff's remedy is at law and not in equity. The trial must proceed either before the court or a jury according to the nature of the case. (*Id.*)

14. In this action, brought upon a promissory note made and delivered to one Eliza R. Wightman, the complaint alleged her death, the admission of her will to probate, and the issue of letters testamentary to the plaintiff as sole executor. The answer denied the appointment of plaintiff as executor and the issue of letters testamentary to him. Upon the trial it appeared that no executor had been named in the will, and that letters of administration with the will annexed had been granted to the plaintiff and one Harriet E. Ackerly. *Held*, that the error in the description of the representative character of the plaintiff was amendable, either before or after judgment, and that such amendment should be allowed by the

general term upon appeal. (*Bisley* agt. *Wightman*, 13 *Hun*, 163.)

15. That any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administratrix with him, was waived by the failure of the defendant to set up the defect in his answer. (*Id.*)

16. This action was brought by a judgment creditor of one Timothy Chapman, in behalf of himself and of all other creditors who might join therein, to compel the assignees of said Chapman to render an account. Upon a hearing before a referee the counsel for the defendants insisted that the action could not be maintained, for the reason that a former accounting had been had between the creditors of the said Chapman and the assignees.

Held, that such former proceedings should have been set up in the answer, and that, not having been pleaded, they could not be proved in bar of the present action. (*Derby* agt. *Yale*, 13 *Hun*, 273.)

17. The referee had made his report in the former action and the same had been filed, but no judgment had been entered thereon. *Held*, that until a judgment had been entered the former action could not be pleaded as a bar to the present one. (*Id.*)

18. In an action brought by a receiver appointed in supplementary proceedings, the complaint alleged that, "by an order of determination, then duly made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver."

Held, that his appointment was sufficiently alleged, and that a demurrer, on the ground that the complaint did not show that he had legal capacity to sue, was properly overruled. (*Manley, Re-*

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- coiver, &c., agt. Raseiga, 18 Hun, 288.)*
19. In an action to set aside a contract for fraud, it is not necessary that the complaint should contain an offer to restore what has been received under it. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary. (*Hay agt. Hay, 13 Hun, 815.*)
20. In an action against a married woman and her husband upon a bond executed by them, it is sufficient if the complaint allege the execution, and delivery thereof by the defendants to the plaintiff, and set forth a copy of the bond. It is not necessary that it should contain any allegation as to her separate property or business. (*Broome agt. Taylor, 13 Hun, 341.*)
21. The answer contained a general denial, and also denied that plaintiff was the proper or real party in interest, and alleged that he had no legal or equitable right to prosecute the action. *Held*, that under such answer the defendant could not prove an assignment of all the estate of the plaintiff to an assignee in bankruptcy, nor the schedule of his property. (*Saunders agt. Chamberlain, 13 Hun, 568.*)
22. *Quære*, whether upon an appeal from a judgment of the justices' court the county court has power to allow an amendment to the answer. (*Id.*)
- A note in order to have the effect of extending the time of payment of a past debt must be alleged to be negotiable — without such allegation answer stricken out as frivolous. (*See Webster agt. Bainbridge, 13 Hun, 180.*)
23. A plea of the statute of limitations of another state or country, where a contract was made, is no bar to an action brought upon the contract in this state; the *lex fori* governs. (*Miller agt. Brenham, 68 N. Y., 88.*)
24. Averments in a complaint as to the meaning or contents of a paper set forth therein, or annexed to and made part thereof, are not admitted by a demurrer. (*Bon-nell agt. Griswold, 68 N. Y., 294.*)
25. Assuming that causes of action arising under the act of 1848 (*chap. 40, Laws of 1848*), against the trustees of a manufacturing corporation for an omission to file an annual report (*sec. 12*) and for making and filing a false report (*sec. 15*) may be united in one action (as to which *quære*), and that a false report may be regarded as no report, in order to justify such union, each of the causes of action must affect all the parties (*Code, sec. 167*). (*Id.*)
26. For an omission to file a report all the trustees are liable; for making and filing a false report only those who do the act are liable. (*Id.*)
27. The complaint herein contained two counts; the first charging defendants as trustees of a manufacturing corporation for an omission to file an annual report; the other charged that the defendants made and filed "a certificate or report, a copy whereof is hereto annexed, marked B," also, "that said defendants * * * signed said certificate knowing it to be false." The copy annexed purported to be signed by but three of the six defendants herein, and in the body, which purported to give the names of those signing the names only of the trustees whose signatures appeared were stated. Three of the defendants demurred. *Held*, that the general allegation of the complaint was qualified by reference to the copy annexed, so that the averment was simply

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that the defendants whose names appear upon the copy actually signed; that the defendants who demurred did not thereby admit the fact that all signed the report; and that the demurrers were properly sustained. (*Id.*)

Plaintiff not bound to anticipate defense, and set up facts in his complaint to meet it. (*See Cahen agt. C. L. A. Co.*, 69 *N. Y.*, 800.)

PLEDGOR AND PLEDGEE.

See MORTGAGE.

Conkling agt. Secor Sewing Machine Co. et al., ante, 269.

POLICE.

See CITY OF TROY.

People ex rel. Seery agt. Police Commissioners, ante, 444.

PRACTICE.

1. In an action brought to recover damages for a breach of a covenant of seizin the plaintiff, to prove the breach, put in evidence a judgment recovered by one Smith against the defendant establishing a lien in favor of Smith upon the property and a *lis pendens* filed at the commencement of that action. After a recovery of judgment by the plaintiff the judgment recovered by Smith was reversed, upon appeal, by the general term.

Upon an appeal by the defendant from the judgment recovered by the plaintiff, and from an order denying a motion for a new trial, *held*, that a new trial should be granted upon payment by the defendant of the costs of the first trial and of this appeal, and of ten dollars costs of opposing the motion below. (*Smith agt. Frankfeld*, 13 *Hun.*, 489.)

2. Where an answer is returned on the ground that the verification of the same is defective, the notice must point out specifically the particulars in which it is defective. (*Snape agt. Gilbert*, 13 *Hun.*, 494.)

8. Some seventeen years since the plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont Railroad Company in its road-bed, which ran generally in the same direction, but at places two or three miles distant from plaintiff's road. At that time the plaintiff took up the tracks from a considerable portion of this route and ceased to use it, the road-bed being in most cases inclosed and used by the adjoining owners. Recently the defendant having acquired the rights and titles of some of the adjacent owners in and to the said road, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed.

This action was brought by the plaintiff to restrain the defendant from so doing. *Held*, that it was not a proper case in which to grant a temporary injunction. (*Troy and Boston R. R. Co. agt. Boston, Hoosac Tunnel and W. R. R. Co.*, 13 *Hun.*, 60.)

4. After the evidence in a case has been agreed upon and submitted to the justice trying the same, and a motion to open the case and take further evidence has been denied by him, a discontinuance of the action should not be allowed. (*Clearwater agt. Decker*, 13 *Hun.*, 63.)

5. On July 7, 1875, the plaintiff herein commenced an action against the defendants upon an undertaking given by them. A demurrer interposed by them was overruled at the special term, but sustained upon an appeal to the general term; and on January 3,

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- 1876, judgment was entered therein dismissing the complaint, with costs. On February 17, 1876, this action was commenced by the same plaintiff against the same defendants, upon the same cause of action. March 11, 1876, the plaintiff appealed, in the first action, from the decision of the general term to the court of appeals. March seventeenth the defendants served an answer in this action, setting up as a defense that another action was pending between the same parties for the same cause of action. *Held*, that the plea referred to the time of the commencement of the action; that, at that time, the former action had been terminated by a final judgment upon the demurrer, and was no longer pending, and that the plea should, therefore, be overruled. (*Porter agt. Kingsbury*, 13 Hun, 33.)
6. *Semble*, that the defendant's remedy was to apply for a stay of proceedings in this action during the pendency of the appeal in the first. (*Id.*)
7. In order to authorize the making of an order before execution returned, requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply the property to the satisfaction of the judgment, and has been refused. (*First National Bank agt. Wilson*, 13 Hun, 232.)
8. An order of the special term denying a motion for judgment on the ground of the frivolousness of a demurrer, is not appealable to the general term. (*Smith agt. Rathbun*, 13 Hun, 47.)
9. A referee has the same power to allow amendments as the court upon the trial of an action. Such amendments may be allowed either to meet an immaterial variance between the pleadings and the proof, or for any other purpose, provided it does not change substantially the cause of action or defense. (*Id.*)
10. When a party claims to be taken by surprise, or misled to his prejudice, by the amendment, proof of such facts must be furnished; without such proof the variance will not be deemed material. (*Id.*)
11. A referee is not obliged to wait until all the evidence is introduced before allowing an amendment to cure a variance, but may permit such amendment to be made at the commencement of the trial, so as to make the pleadings conform to the evidence which the party proposes to introduce. (*Id.*)
12. Where a referee allows a plaintiff to amend his complaint by adding thereto allegations which do not substantially change the cause of action set forth therein, he cannot allow the defendant, who has theretofore answered, to interpose a demurrer thereto. (*Id.*)
13. Where a referee has allowed a defendant to serve a demurrer to a complaint so amended, the plaintiff is not confined to an appeal from the order of the referee, but may move at special term to have the demurrer stricken out. (*Id.*)
14. Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer. (*Id.*)
15. Although the terms upon which an amendment is allowed rest in the discretion of the referee, yet if he impose terms which he has no authority to impose, it ceases to be a matter of discretion, and his mistake may be corrected. (*Id.*)
16. In this action, brought upon a promissory note made and delivered to one Eliza R. Wightman, the

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- complaint alleged her death, the admission of her will to probate, and the issue of letters testamentary to the plaintiff as sole executor. The answer denied the appointment of plaintiff as executor and the issue of the letters testamentary to him. Upon the trial it appeared that no executor had been named in the will, and that letters of administration with the will annexed had been granted to the plaintiff and one Harriet E. Ackerley. *Held*, that the error in the description of the representative character of the plaintiff was amendable either before or after judgment, and that such amendment should be allowed by the general term upon appeal. (*Risley* agt. *Wightman*, 18 *Hun*, 168.)
17. That any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administratrix with him, was waived by the failure of the defendant to set up the defect in his answer. (*Id.*)
18. By an order of the special term, made upon an application for the confirmation of the report of a referee, two claims presented by one M. to the referee, and allowed by him were disallowed. M. appealed from so much of the order as disallowed one of the said claims. Subsequently and after the decision of the said appeal, he brought this appeal from the portion of the order disallowing the second claim. *Held*, that his right to appeal from the order was exhausted by the first appeal, and that the second appeal could not be maintained. (*Thompson* agt. *Taylor*, 18 *Hun*, 201.)
19. Affidavits, made after the making of an order at the special term, cannot be read upon the hearing at the general term, even although all the parties to be appointed consent thereto. (*Id.*)
20. Under the provisions of the Code of Civil Procedure an appeal will lie to the general term from a judgment entered upon the report of a referee, in an action pending in a county court, upon a case and exceptions settled by such referee; and a prior motion for a new trial in the county court, upon the exceptions and the decision of the referee is no longer requisite. (*Kilmer* agt. *O'Brien*, 18 *Hun*, 224.)
21. This action was brought by a judgment creditor of one Timothy Chapman, in behalf of himself and of all other creditors who might join therein, to compel the assignees of said Chapman to render an account. Upon a hearing before a referee the counsel for the defendants insisted that the action could not be maintained, for the reason that a former accounting had been had between the creditors of the said Chapman and the assignees. *Held*, that such former proceedings should have been set up in the answer, and that, not having been pleaded, they could not be proved in bar of the present action. (*Derby* agt. *Yale*, 18 *Hun*, 273.)
22. The referee had made his report in the former action and the same had been filed, but no judgment had been entered thereon. *Held*, that until a judgment had been entered the former action could not be pleaded as a bar to the present one. (*Id.*)
23. Although in former times, courts of equity have refused to enforce "stale demands," yet since the adoption of the Code prescribing limitations for both legal and equitable actions no court can refuse to entertain an action on account of the staleness of the demand, providing it be brought within the time prescribed by the statute. (*Id.*)
24. Where an action is brought by

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- some of the creditors of a debtor, in behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of the action, none but the plaintiffs therein acquire any vested interest in such an action, or are bound thereby, until a final judgment has been entered therein. (*Id.*)
25. The complaint in this action alleged that in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, and that the same were wrongfully taken and carried away by the defendant herein and converted to his own use. *Held*, that the action was a proper one in which to order a bill of particulars. (*Robinson* agt. *Comer*, 18 *Hun*, 291.)
26. A new trial, on the ground of newly-discovered evidence, should only be granted upon condition that the party applying therefor shall pay the costs of the former trial. (*Comstock* agt. *Dye*, 18 *Hun*, 118.)
27. In an action of ejectment the plaintiff recovered upon the trial before a referee; a new trial was ordered by the general term, costs to abide the event. On the second trial defendant obtained a verdict in his favor; a new trial was granted on the ground of newly-discovered evidence, on payment of \$150, costs and disbursements of the action, and ten dollars costs of the motion, after payment of which, a third trial was had and a verdict rendered in favor of plaintiff. *Held*, that plaintiff was not entitled to bear costs for either the first or second trials, but only for the third. (*Provost* agt. *Farrell*, 18 *Hun*, 308.)
28. Fees paid to a stenographer and for preparation of maps cannot be taxed. (*Id.*)
29. No question, either of fact or of law, arising upon a trial — *e. g.*, an objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery — can be reviewed upon appeal, except upon a case made and settled according to the established practice. (*McLean* agt. *Cole*, 18 *Hun*, 800.)
30. A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. (*Hay* agt. *Hay*, 18 *Hun*, 815.)
31. The directing a *pro forma* verdict at circuit, and reserving the cause for further argument and consideration to be had on a motion made on the judge's minutes to set aside the verdict, and on hearing of such motion directing judgment in favor of the party entitled thereto, approved. (*Hall* agt. *Hall*, 18 *Hun*, 806.)
32. Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue. (*Cochrane* agt. *Ingersoll*, 18 *Hun*, 868.)
33. This action was brought by the receiver of an insolvent insurance company to recover dividends alleged to have been wrongfully paid to the defendant, a stockholder of the company, at a time

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when the corporation was insolvent, such payments having been made out of the capital and assets of the company and received by the defendant in fraud of the rights of the creditors of the company. *Held*, on a motion to refer the action, on the ground that it involved the examination of a long account, that the action sounded in tort and could not be referred against the objection of either party. (*Wickham* agt. *Frazer*, 13 *Hun*, 431.)

84. In order to authorize a reference under sections 21 and 23 of 3 Revised Statutes (6th ed.), page 89, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion but to the officer who appointed the trustees, or to a justice of the supreme court at chambers residing in the district, upon a notice of at least ten days. *Quære*, whether under this statute a reference can be ordered in an action sounding in tort. (*Id.*)

85. November 20, 1869, an order for the arrest of the defendant was granted in this action, and on December 28, 1869, a motion to vacate the same was denied with leave to renew the motion on showing the amount secured by an attachment previously issued in the action. In 1872 the action was tried and judgment recovered by the plaintiff. In February, 1877, this motion was made to vacate the order of arrest. *Held*, that it was properly denied, as the leave to renew was only given for a special purpose, and the right to renew was terminated by the entry of the judgment. (*Mills* agt. *Rodewald*, 13 *Hun*, 439.)

86. Upon a motion for an order to

send back a case to a referee for further findings, it appeared that he had already passed upon such questions by refusing to find as requested, and that in each case the party requesting the finding had duly expected to his refusal so to find. *Held*, that the motion was properly denied, as upon such a motion the special term was not authorized to look into the whole case and determine that the referee ought to decide questions presented to him differently from what he had already done. (*People* agt. *Bank of North America*, 13 *Hun*, 434.)

87. In an action for partition, in which one of the defendants was an infant, the complaint alleged that the land therein described was the only real estate owned in common by the defendants. The defendant demurred on the ground that it was not averred that the lands described in the complaint were the only lands owned in common by the parties as required by Rule 78 of the rules of 1876. *Held*, that the demurrer was properly overruled; that if the allegation was defective, it was because of its uncertainty, and the remedy was by motion and not by demurrer. (*Moffatt* agt. *McLaughlin*, 13 *Hun*, 449.)

88. The term "adverse party," as used in section 348 of the Code, requiring notice of the entry of judgment, affirming the judgment appealed from, to be served upon the "adverse party" at least ten days before commencing an action upon the undertaking, means the parties to the original judgment by whom the appeal was taken. (*Yates* agt. *Burch*, 13 *Hun*, 622.)

89. One question was: "Has the party had, during the last seven years, any severe sickness or disease; if so, state the particulars and the names of the attending physicians, or who was consulted

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and prescribed?" The answer in the first application was: "Has had nervous difficulty and diarrhoea; C. H. Carpenter, Geneva, N. Y.;" in the second it was "No." The court left it to the jury to determine whether or not the nervous difficulty or diarrhoea was, in fact, a severe sickness or disease. *Held*, that this was proper; that if the nervousness and diarrhoea were not, in fact, severe diseases, the discrepancy between the two answers was not material. (*Edington* agt. *Aetna Life Ins. Co.*, 13 *Hun*, 543.)

40. An answer contained a general denial, and also denied that plaintiff was the proper or real party in interest, and alleged that he had no legal or equitable right to prosecute the action. *Held*, that under such answer the defendant could not prove an assignment of all the estate of the plaintiff to an assignee in bankruptcy, nor the schedule of his property. (*Saunders* agt. *Chamberlain* 13 *Hun*, 568.)

41. Whether upon an appeal from a judgment of the justices' court the county court has power to allow an amendment to the answer. (*Id.*)

42. Where exceptions are taken during the trial, the direction of a verdict, subject to the opinion of the court, is error. The consent thereto is a waiver of the exceptions. (*Biddlecom* agt. *Newton*, 13 *Hun*, 582.)

43. An objection to evidence taken under a commission, that the commission was not executed by the person intended, should be raised by motion to suppress where the party has an opportunity so to do; if not so raised it will be deemed to have been waived; it cannot be raised upon the trial, where the party had knowledge of the fact at sufficient time before the trial to enable him to make the

motion. (*Newton* agt. *Porter*, 69 *N. Y.*, 183.)

44. Where a verdict is ordered subject to the opinion of the court at general term, without qualification, exceptions cannot be heard, and the only question for the general term is which party is entitled to final judgment on the uncontroverted facts; no new trial can be granted, but final judgment must be rendered for one party or the other without regard to which party had the verdict. (*Durant* agt. *Abendroth*, 69 *N. Y.*, 148.)

PRESUMPTIONS.

1. It being the duty of the county clerk to have and keep a judgment-roll on deposit in his office (*Code, secs.* 281, 282), if it cannot be found in the particular place provided for such deposit, the presumption is that it is lost or destroyed and secondary evidence may be given of its contents. (*Mandeville* agt. *Reynolds*, 68 *N. Y.*, 852.)

2. Where a lost paper which was the basis of official action, was of a kind usually drawn up in accordance with a statute, and usually following a printed form devised therefor, it is to be presumed that the paper was in the usual form, and followed the requirements of the statute. (*Id.*)

3. The rule applicable to sales by executors, guardians and other officers, that the lapse of thirty years' time raises a conclusive presumption that all legal formalities of the sale were observed, does not apply to sales made in derogation of the common law, the proceedings for which are required to be evidenced by records and public documents which are supposed to remain in the custody of the officers charged with their preservation; these

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must be proved or their loss accounted for, and supplied by secondary evidence. (*Hilton agt. Bender*, 69 N. Y., 76.)

4. If they cannot be found, or their loss accounted for, the presumption is, in the absence of evidence, that they never existed. (*Id.*)

5. It seems that where a purchaser at a tax sale has taken possession undisturbed, and has continued undisturbed in the peaceful enjoyment of the property, claiming by virtue thereof, for a long period, and the owner is chargeable with knowledge of the same, and is in a condition to contest the title, a strong presumption arises as to regularity; and as to matters not of record, the presumption may be conclusive after thirty years; but if the purchaser does not take possession until his deed is very old, no presumption arises as to the regularity of any of the proceedings. (*Id.*)

6. The presumption that a party intends the ordinary and probable consequences of his acts is not conclusive, but may be rebutted by competent evidence. (*Filkins agt. People*, 69 N. Y., 101.)

7. It is not the duty of a party to a civil action to call every person as a witness who may give material evidence in his favor, and the mere omission on his part to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and give evidence, is not necessarily so suspicious as to authorize an inference that the testimony of the witness, if he had been produced, would have been adverse to the party. (*Bleeker agt. Johnson*, 309.)

8. In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value; this presump-

tion is not repelled merely by proof that the paper as between the immediate parties was without consideration, and was made, indorsed or accepted by one for the sole accommodation of the other. (*Harger agt. Worral*, 69 N. Y., 370.)

9. It is to be presumed in favor of the validity of proceedings appointing a special administrator that he took the oath required by law. (*Dayton agt. Johnson*, 69 N. Y., 419.)

10. In an action on the bond of a special administrator upon due proof being made that upon the settlement of the accounts of defendant's principal, it appeared an amount of money remained in his hands which he had failed to pay over, the burden is upon the defendant to show that this has been paid over; the presumption is that it has not been, and to escape liability the presumption must be rebutted by proof that it has. (*Id.*)

11. Where it appears that a vessel is owned by the master in command, and that the cargo is owned by another, the legal presumption is that the former is a common carrier for hire, responsible for the carriage and delivery of the cargo to the consignee. (*Arctic F. Ins. Co. agt. Austin*, 69 N. Y., 471.)

When creditor receives from debtor note of third person, the presumption is that it was received as payment. (*See Shaw agt. Republic L. Ins. Co.*, 69 N. Y., 286.)

Against party refusing to produce a contract on trial. (*See Cahen agt. C. L. A. Co.*, 69 N. Y., 300.)

Mailing of notice of dissolution of copartnership, properly directed, raises presumption that notice was received by the one to whom it was directed. (*See Austin agt. Holland*, 69 N. Y., 371.)

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PRINCIPAL AND AGENT.

1. A lease under seal, executed by an agent as lessee in his individual name and which does not purport to be executed on behalf of the principal is not binding upon the latter, although the fact of the agency is recited therein, and although it appears by extrinsic evidence that the lessee acted as agent; the instrument can only be enforced against the party who appears upon the face of it to be the covenantor. (*Kierstedt* agt. *O. and A. R. R. Co.*, 69 N. Y., 343.)
2. Where, during the continuance of the term under which such a lease, the principal enters and occupies the demised premises, no assignment having been made of the lease, in the absence of evidence upon the subject, the presumption is that he entered as subtenant. (*Id.*)
3. The fact that he furnished the money to pay the rent does not make him tenant of the lessor; and any liability for use and occupation is to the agent and not to the lessor. (*Id.*)
4. An agent cannot bind his principal to the receipt of money due from himself by a mere acknowledgment, signed by himself as agent that he has received it; he cannot act for himself and for his principal also in the same transaction. (*Neuendorff* agt. *World Mut. L. Ins. Co.*, 69 N. Y., 389.)
5. The possession of a carrier is that of the owner of the freight, and whatever is done by the former in the course of his services and bailment, he does as the agent and representative of the latter. If, therefore, loss or damage results to the cargo, to which the carrier by his wrongful or negligent acts has contributed, the owner is deprived of any remedy over against a third person; he can only recover upon proof that loss was

occasioned solely by the wrongful acts or negligence of such third person. (*Arctic F. Ins. Co.* agt. *Austin*, 69 N. Y., 471.)

6. The husband of the plaintiff, as her agent, but in his own name, entered into a contract under seal with defendant for the sale by the latter of certain real estate. Plaintiff was present during the negotiations. She received the deed from defendant, paid the consideration and took possession of the land. *Held*, that an action could be maintained by plaintiff for fraud in the sale on the part of defendant. (*Beardsley* agt. *Duntley*, 69 N. Y., 577.)

When insurance company bound by acts of agent in making out application. (*See Sprague* agt. *H. Ins. Co.*, 69 N. Y., 128.)

Authority of cashier of national bank to bind the bank by a contract to purchase United States bonds. (*See Yerkes* agt. *Nat. Bank of P. J.*, 69 N. Y., 382.)

PRINCIPAL AND SURETY.

See SUBROGATION.

Morgan et al. agt. *Francklyn*, ante, 244.)

1. A married woman is not liable upon a guardian's bond, executed by her as surety, when there is nothing expressed therein showing an intention to charge her separate estate. (*Gosman* agt. *Oruger*, 69 N. Y., 87.)
2. The fact that the bond was executed in compliance with an order of the court, and that the law requires two sufficient sureties, does not make her liable. (*Id.*)
3. So also the making of an affidavit on her part that she possessed enough estate to make her a sufficient surety, does not incorporate into her contract an expres-

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sion of intent to bind her separate estate. (*Id.*)

4. Suretyship for a guardian is not an exception to the rule that the contract of suretyship, if void at law, cannot be enforced in equity. (*Id.*)

PRIVILEGED COMMUNICATIONS.

1. Information as to the condition of the insured acquired by a physician while attending upon him, which was necessary to enable the physician to prescribe, he is prohibited from disclosing (2 *R. S.*, 406, sec. 73) and he is incompetent as a witness to testify thereto. (*Dilleber* agt. *Home L. Ins. Co.*, 89 *N. Y.*, 256.)

PROCESS.

1. The want of process to bring a defendant into court may be waived by a voluntary appearance in the action; but to be effectual, such appearance must be with knowledge that there is an action pending and with a full intention to appear therein. (*Merkes* agt. *City of Rochester*, 13 *Hun*, 157.)
2. The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, unless he notify him that an action is pending against him and unless he fully understands the nature of the proceedings. (*Id.*)

PROMISSORY NOTE.

See NOTICE OF PROTEST.

Wynen agt. *Schappert*, ante, 156.

PROPERTY.

See WATER.

Myer agt. *Whitaker*, ante, 376.

PROVISIONAL REMEDY.

1. An order authorizing a substituted or constructive service of a summons is not an order granting a provisional remedy, within the meaning of section 772 of the Code of Civil Procedure. (*McCarthy* agt. *McCarthy*, 13 *Hun*, 579.)

PUBLIC OFFICER.

1. The complaint in this action alleged that the defendant was the head of the department of buildings in the city of New York; that it was his duty to see that all unsafe buildings in said city were taken down or made secure, and that he was furnished with the means necessary to fulfill the said duty; that a building, known as No. 25 Duane street, was so injured by fire as to render it unsafe, and that defendant had notice of its condition; that the said building fell upon an adjoining building in which the plaintiff's intestate lawfully was and killed her, and asked judgment for damages against the defendant. *Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be overruled. (*Connors* agt. *Adams*, 13 *Hun*, 427.)
2. The warden of the city prison in New York is a public officer, and an action brought to recover damages for an act done by him in virtue of his office, must be tried in the county of New York. (*Cowen* agt. *Quinn*, 13 *Hun*, 344.)

QUESTION OF LAW AND FACT.

1. The question of acceptance under a verbal contract void under the statute of frauds, is ordinarily one of fact, but where the uncontroverted facts afford no ground for finding an acceptance, or

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where the evidence is such that the court would feel bound to set aside a verdict so finding, it is the duty of the court to take the case from the jury. (*Stone* agt. *Browning*, 68 N. Y., 598.)

2. It is not under all circumstances negligence, as matter of law, for a person to get upon a street car while in motion. In exceptional cases, where the conditions are unfavorable, it may be so, but ordinarily it is a question of fact for the jury. (*Eppendorf* agt. *B. C. and N. R. R. Co.*, 69 N. Y., 195.)

3. The interpretation of a contract between a towing company and a master and owner of a boat to be towed, and what are the legal relations between the parties and the relative rights and obligations resulting therefrom, are questions of law for the court, and a submission thereof to a jury is error. (*Arctic F. Ins. Co.* agt. *Austin*, 69 N. Y., 470.)

4. One H. had been in the employ of the firm of D. B., & Co., of Toledo, prior to its dissolution; he resided at Detroit. Notice of the dissolution was published in the Toledo papers, and a copy mailed to plaintiff, addressed to him at Detroit. The business was thereafter continued in the same firm name. In an action against the members of the original firm upon a promissory note given in the firm name to H., for services rendered subsequent to the dissolution, H. testified on his direct examination that he never received the notice; on his cross-examination that he had no recollection of receiving or seeing it, and that if he had seen it he thought he should have remembered it. Held that the question of notice was properly submitted to the jury, and justified a finding that none had been received. (*Austin* agt. *Holland*, 69 N. Y., 571.)

When question of negligence one of

fact. (*See Twomley* agt. *C. P. N. and E. R. R. Co.*, 69 N. Y., 158.)

When question whether servant did a wrongful act with a view to injure another and not with a view to his master's service, is one of fact. (*See Cohen* agt. *D. D. E. B. and B. R. R. Co.*, 69 N. Y., 170.)

RAILROADS.

1. Every corporation formed under the general laws for the formation of railroad corporations, previous to 1869, are required by the Laws of 1867 (*chapter 775, section 1*) to begin the construction of its road, and spend thereon ten per cent of its capital, within five years after its articles should be filed and recorded in the office of the secretary of state; and to finish its road and put it in operation in ten years from the time of such filing, &c., or in default thereof "its corporate existence shall cease." (*Matter of Brooklyn, Winfield and Newtown R. R. Co.*, *ante*, 14.)

2. The existence of the corporation is determined by the omission to comply with either of the prescribed conditions; and the omission to begin the construction and spend ten per cent of the capital within five years is as fatal as the failure to finish the road within the ten years. (*Id.*)

3. Where, by non-performance of either of these conditions, the company forfeits or loses its corporate rights and powers, the fact may be asserted by any one whose lands or property is sought to be appropriated to the uses of the corporation under the laws authorizing the taking of private property for public use. (*Id.*)

4. The company was organized February 3, 1869. It is in proof that it has not at this time (July 19, 1877) begun a construction of its

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road, or made any part of the expenditure required by law to be made within five years, although that period expired in February, 1874.

Held, that such proof brings it directly within the act declaring that its existence and power should cease upon that contingency.

Held, also, that the time for the performance of either of the conditions imposed by the Laws of 1867 was not extended by the several special acts of the legislature (*Laws of 1869, chapter 718; Laws of 1870, chapter 612; Laws of 1871, chapter 622; Laws of 1872, chapter 705*). (*Id.*)

5. On the 25th of May, 1874, after the expiration of the time for the beginning of the work of constructing the road had passed, the legislature passed an act (*Laws of 1874, chapter 575*) declaring that the time for beginning as well as finishing the road was extended for three years from the date of the act. The three years expired May 26, 1877. The application by the company for leave to take the respondent's land was made upon a petition verified July 19, 1877.

Held, that as the company had not at the time either begun nor finished its road, its corporate existence and powers had ceased.

Held, also, that the act of 1875 (*Laws of 1875, chapter 598*), which is general, and applicable to all railroad companies within its provisions, does not apply to this company. It was not in default. It had yet, by the special act of 1874, two full years within which to complete its road, and the law of 1875 was framed for the relief of roads which were *then* in default. (*Id.*)

RAILROAD MORTGAGE BONDS.

1. A judgment of a court of another state is only conclusive upon parties where it is a definite judg-

ment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in this state. (*Taylor agt. Atlantic and Great Western Railway Co., ante, 275.*)

2. The N. G. and W. R. Co. was incorporated under the laws of the states of Pennsylvania, Ohio and New York. A mortgage upon the Ohio division was executed to M., as trustee, and another and subsequent mortgage upon all the property in the three states was executed to T. and D., as trustees, who brought suit in each of the three states to foreclose the same. An agreement was entered into between M. and a majority of the bondholders under the Ohio mortgage and T. and D. extending the time of payment of the Ohio mortgage for three years, and changing the interest during such extended term from currency to gold. This agreement was not to take effect until confirmed by the courts in each of the three states. It has been confirmed by the court in Ohio, and is now presented to this court and a confirmatory order asked for upon the basis of the Ohio order, which application is opposed by some of the second mortgage bondholders.

Held, that the agreement itself contemplates a distinct and independent approval by the courts of each one of the states in which actions are pending for the foreclosure of the mortgage and the sale of the company's property. A distinct and separate approval was what was in terms required, according to the conclusions reached as to the propriety of the agreement by the courts respectively of these different states; and that rendered an examination of the facts, upon which the application has been made, necessary for the purpose of determining whether such approval ought to be given. (*Id.*)

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3. Every bondholder is equally entitled by the agreement made with him, and with the trustees for his benefit, to be protected in all the advantages legally secured by it. And for that reason the courts cannot disregard the principle protecting him, because the amount due to him, and the extent to which he may be entitled to participate in the advantages of the security, may be, comparatively speaking, not very significant. It is enough that a material right may be prejudiced, and the party deprived of the full advantage of his contract and security to require that the court shall not interpose to his manifest injury. (*Id.*)

4. The bondholders secured by the second mortgage, by virtue of that instrument, have become, both legally and equitably, entitled to have the proceeds of the property applied upon their debt after paying off the first incumbrances. This court has no power to sanction any change in the effect of the terms of that instrument. (*Id.*)

5. It would be grossly unjust to the second mortgage bondholders to change the payments of interest in the first mortgage bonds from currency to gold, and the court has no authority which would permit it to take that difference for a period of three years from the holders of the second mortgage bonds and give it to the more fortunate owners of the first, against the objections of those resisting the proceeding. (*Id.*)

6. Where the validity of the contract was also made dependent upon the approval of the trustees under the first mortgage, and one of them had since resigned, and the other had simply placed himself under the advice and direction of the court :

Held, that this was not what was provided for by the terms of the agreement. The judgment of

the trustee upon the subject was required, for his approval could not be given or withheld without the exercise of judgment. Nor can the court, dispense with the observance of that requirement, because one of the persons named afterwards resigned his office. (*Id.*)

See INJUNCTION.

Reinart agt. *Meyer*, ante, 288.

See JURISDICTION.

Matter of United States Rolling Stock Co., ante, 286.

RECEIVER.

See INSURANCE COMPANY.

Matter of the Atlantic Mutual Life Ins. Co., ante, 77.

See INSURANCE COMPANY.

Matter of North American Life Insurance Company, ante, 465.

1. In an action brought by a receiver appointed in supplementary proceedings, the complaint alleged that, "by an order of determination, then *duly* made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver." *Held*, that his appointment was sufficiently alleged, and that a demurrer, on the ground that the complaint did not show that he had legal capacity to sue, was properly overruled. (*Manley, Receiver*, agt. *Rassiga*, 18 *Hun*, 288.)

2. A receiver of an insolvent insurance company, appointed under chapter 463 of the Laws of 1853, is not entitled to have transferred to him the securities deposited by the company with the superintendent of the insurance department. (*Matter of Guardian Mutual Life Insurance Co.*, 13 *Hun*, 115.)

3. Where a receiver is appointed in an action by a married woman for divorce, in pursuance of the provisions of the Revised Statutes

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(1 R. S., 148, sec. 60), authorizing the sequestration of the personal property and of the rents and profits of the real estate of the husband, and the appointment of a receiver thereof, when an order for alimony has been granted and defendant has neglected or refused to pay the same or to give security therefor, such receiver acquires no title to the real estate, but simply is entitled to possession as against defendant and all claiming under him; and so long as his rights are unquestioned, and there is no interference therewith, either actual or threatened, he has no concern with the title, and cannot maintain an action to determine the validity of transfers thereof by the defendant. (*Foster* agt. *Townshend*, 68 N. Y., 203.)

4. Accordingly *held*, that a receiver so appointed could not maintain an action to set aside a conveyance of the real estate alleged to have been fraudulently made by the husband after the appointment of the receiver, or to set aside an alleged fraudulent assignment by the husband, of a mortgage received by him upon conveyance, in the absence of any allegation that defendants had made a claim or asserted a title adverse to the rights of plaintiff. (*Id.*)
5. Also, *held*, that an action could not be maintained by the receiver to restrain an assignment by the assignee of such a mortgage, or to restrain the foreclosure thereof. (*Id.*)
6. It *seems* that any proceedings to compel an application of the rents and profits of the husband's real estate, or in any way to compel the payment of the alimony from the property should be brought by the wife. (*Id.*)
7. It *seems*, also, that had the assignee of such a mortgage asserted an adverse claim to the rents and

profits of the real estate, the wife would have had a remedy by an order for the examination of the claimant *pro interesse suo*, and such proceedings thereon as would lead to a determination of the rights of the parties. (*Id.*)

8. Where a judgment creditor at whose instance a receiver had been appointed in supplementary proceedings, instigates and conducts a prosecution against third persons through the receiver for his own benefit, and in which he is solely interested, in case he is defeated, is liable for costs. (*Ward* agt. *Roy*, 69 N. Y., 96.)

RECORDING ACT.

1. Under the recording acts, all unrecorded instruments in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, is void and of no effect as against any subsequent mortgagee, or assignee of a mortgage, who in good faith and for a valuable consideration takes a mortgage, or an assignment of a mortgage. Equity gives no assistance against a "purchaser" for a valuable consideration without notice. (*Mutual Life Ins. Co.* agt. *Wilcox*, *ante*, 43.)
2. A release of part of mortgaged premises is a "conveyance" by which the title to real estate may be effected, and unless duly recorded is void against a subsequent assignee of a mortgage for value, and without notice, under the recording act. (*Id.*)
3. The general rule is that where the possessor of land causes the registry of a particular title, a subsequent purchaser need not look beyond it. The purchaser has a right to assume where the possessor has put his deed on record, that he has recorded all the

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conveyances affecting his title. (*Id.*)

4. The rule of constructive notice by possession does not apply to the assignee of a prior mortgage, because the natural inference in such a case is that the occupant is holding subject to the mortgagee. (*Id.*)
5. The general rule that a purchaser of a mortgage takes it subject to all latent equities existing in favor of the mortgagor, and also of third parties, relates only to those equities which are not within the scope of the recording act, and against which subsequent purchasers, *bona fide*, are thereby protected. (*Id.*)
6. A sheriff's deed, given in pursuance of a sale upon execution, and duly recorded, is protected by and has the benefit of the recording act (1 R. S., 756, sec. 1). (*Held* agt. *Barber*, 69 N. Y., 1.)
7. E. devised certain real estate to her husband and two daughters, one-third to each. In February, 1869, the husband conveyed the one-third devised to him to plaintiff by deed, which was not recorded until December, 1871. The premises were sold in January, 1870, upon execution against the husband, and in pursuance thereof defendant, who was a purchaser in good faith, for a valuable consideration, without notice of the prior conveyance, received the sheriff's deed April 17th, 1871, which was recorded on that day. In an action of ejectment, *held*, that defendant was entitled to the one-third. (*Id.*)

REFEREE.

1. The submission to the referee was December 26, 1877. On February 22, 1878, the referee prepared, finished and signed his report, and on the twenty-third notified the

attorney for the defendant that he had made his report for defendant and had left the same on his (the referee's) table for the defendant's attorney, and at the same he stated to defendant's attorney the amount of his fees. On the twenty-third or twenty-fifth of February the defendant's attorney informed the plaintiffs' attorney that the referee had made his report for defendant and that the referee was about to prepare an opinion which he would serve with a copy of the report :

Held, that the facts shown in the case and the notification made by the referee to defendant's attorney was, in substance and effect, a *delivery* of the report to the attorney within the provisions of section 1019 of the Code of Civil Procedure. (*Quackenbush* agt. *Johnson*, ante, 94.)

2. The requirement of section 1016 of the Code of Civil Procedure, that "a referee, before proceeding to hear the testimony, *must* be sworn faithfully and fairly to try the issues, &c., unless the oath be *expressly* waived by written stipulation or orally, in which latter case the waiver *must* be entered in the referee's minutes," is directory merely, and may be waived by the acts and acquiescence of the parties to the proceeding. (*Nason* agt. *Luddington*, ante, 342.)
3. Where the defendant and his attorney, both learned in the law, and with knowledge of the provision of this section as to the oath of the referee, voluntarily, and without objection, conduct the defense to an unsuccessful issue, which was followed by an acquiescence in the validity of the proceedings, as shown by an application for additional time to file exceptions to the report, and opposition to the motion for an extra allowance:

Held, that the defendant had waived his right to the statutory requirement as to the oath of the referee (*See The Exchange Fire Ins.*

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Co. agt. Early, 54 How., 279; McGowan agt. Newman, id., 458. (Id.)

See MORTGAGE FORECLOSURE.

Eleventh Ward Savings Bank agt. Hay, ante, 444.

4. A referee has the same power to allow amendments as the court upon the trial of an action. Such amendments may be allowed either to meet an immaterial variance between the pleadings and the proof, or for any other purpose provided it does not change substantially the cause of action or defense. (*Smith agt. Rathbun, 13 Hun, 47.*)
5. When a party claims to be taken by surprise, or misled to his prejudice, by the amendment, proof of such facts must be furnished; without such proof the variance will not be deemed material. (*Id.*)
6. A referee is not obliged to wait until all the evidence is introduced before allowing an amendment to cure a variance, but may permit such amendment to be made at the commencement of the trial, so as to make the pleadings conform to the evidence which the party proposes to introduce. (*Id.*)
7. Where a referee allows a plaintiff to amend his complaint by adding thereto allegations which do not substantially change the cause of action set forth therein, he cannot allow the defendant, who has theretofore answered, to interpose a demurrer thereto. (*Id.*)
8. Where a referee has allowed a defendant to serve a demurrer to a complaint so amended, the plaintiff is not confined to an appeal from the order of the referee, but may move at special term to have the demurrer stricken out. (*Id.*)
9. Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer. (*Id.*)
10. Although the terms upon which an amendment is allowed rest in the discretion of the referee, yet if he impose terms which he has no authority to impose, it ceases to be a matter of discretion, and his mistake may be corrected. (*Id.*)
11. This action was brought by the receiver of an insolvent insurance company to recover dividends alleged to have been wrongfully paid to the defendant, a stockholder of the company, at a time when the corporation was insolvent, such payments having been made out of the capital and assets of the company and received by the defendant in fraud of the rights of the creditors of the company.
Held, on a motion to refer the action, on the ground that it involved the examination of a long account, that the action sounded in tort and could not be referred against the objection of either party. (*Wickham agt. Frazer, 13 Hun, 481.*)
12. In order to authorize a reference under sections 21 and 22 of 3 Revised Statutes (6th ed.), page 39, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion, but to the officer who appointed the trustees, or to a justice of the supreme court at chambers residing in the district, upon a notice of at least ten days.
Quære, whether under this statute a reference can be ordered in an action sounding *in tort*. (*Id.*)
13. In an action to foreclose a mortgage the costs are in the discretion

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of the court. Where a referee in such a case decides that the plaintiff is only entitled to certain costs, his error, if any, can only be corrected by an appeal from the judgment, and not upon a motion. (*Loosee* agt. *Ellis*, 13 *Hun*, 656.)

REFERENCE.

1. Where a question of fact arising upon a motion is referred, as authorized by the Code (*sec.* 27) the court has no authority to allow disbursements in addition to ten dollars cost of motion. (*Concklin* agt. *Taylor*, 68 *N. Y.*, 221.)
2. Where upon the trial of an action by a referee, a motion is made on the part of defendant, at the close of the evidence to dismiss the complaint which is not passed upon at the time, and the referee subsequently makes his report with findings of fact adverse to plaintiff, and as a conclusion of law finds that the complaint be dismissed, this cannot be considered the same as a non-suit, but as a disposition of the case upon a consideration of all the testimony. (*Vanderlip* agt. *Keyser*, 68 *N. Y.*, 443.)
3. Assuming that, upon a motion to dismiss the complaint at the close of the testimony, a question arises, the same as upon a motion for a non-suit, a distinct ruling must be had at the time, or as of the time the motion was made, and before the final submission of the whole case, and an exception taken in order to raise the question that the decision was, as matter of law, that there was no evidence to sustain the complaint; or, at least, a request should be made that the referee decide the motion as of that time, and an exception taken to a refusal. Exceptions merely taken to the referee's finding of fact and to his conclusions of law do not present the point. (*Id.*)

Where a referee's report passes on all the material facts, an exception to his refusal to find facts according with the views of the defeated party is not tenable, (*See Mc Dougall* agt. *Hess* [*Mem.*], 68 *N. Y.*, 620.)

RELEASE.

1. A release of part of mortgaged premises is a "conveyance" by which the title to real estate may be effected, and unless duly recorded is void against a subsequent assignee of a mortgage for value, and without notice, under the recording act. (*Mutual Life Insurance Co.* agt. *Wilcox*, *ante*, 43.)

Of bond under seal expressing consideration, although none was paid, extinguishes bond, and subsequent assignment transfers no interest. (*See Simson* agt. *Brown*, 68 *N. Y.*, 355.)

2. Plaintiff filed a lien for materials furnished for thirty houses; he released fifteen houses upon being paid the full value of the materials which went into those houses. *Held*, that his lien upon the remaining fifteen houses for the balance of his account was not affected by the release. (*Hall* agt. *Sheehan*, 69 *N. Y.*, 618.)

REMEDY.

1. Where an attorney in an action is in contempt for the violation of an injunction therein, or for any act inconsistent with his relation to the court, and suitors have sustained damage, the remedy is by summary proceedings, not by action. (*Foster* agt. *Townshend*, 68 *N. Y.*, 203.)
2. A writ of *mandamus*, upon the application of one claiming title to an office, will not be granted, for the purpose of determining

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the validity of his claim, where there is a serious question in regard thereto, and another person is holding and exercising the functions of the office, and this, although the attorney-general refuses to bring an action in the nature of a *quo warranto*. (*In re Gardner*, 68 N. Y., 467.)

3. Where a right is granted by statute, or exists at common law a subsequent statute giving a new remedy or penalty or forfeiture for a violation of that right, is cumulative and not a substitute for former and existing remedies and penalties. (*Tremain* agt. *Richardson*, 68 N. Y., 617.)

When in an action for divorce brought by the wife, the rents and profits of defendant's real estate have been sequestered and another asserts adverse claim to rents and profits, the wife has a remedy by order for examination of claimant, *pro interesse suo*. (*See Foster* agt. *Townshend*, 68 N. Y., 203.)

By officer who has been unlawfully ousted, on recovery of office, to recover salary paid to intruder, is by action against the latter. (*See Dolan* agt. *Mayor etc.*, 68 N. Y., 274.)

REPLEVIN.

1. A sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife. *Held*, that the act of the sheriff in levying upon the property was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property. (*Alvord* agt. *Haines*, 13 Hun, 26.)
2. That his liability was not affected by the fact that he claimed to levy upon, and advertised for sale the interest of the husband alone,

when the husband had, in fact, no interest therein. (*Id.*)

3. The facts that the plaintiff, in the judgment, directed the sheriff to get the executions, and consulted and advised with him and approved of his making the levy, are sufficient to sustain a verdict against him. (*Id.*)
4. An objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery, can only be reviewed upon appeal, upon a case made and settled according to the established practice. (*McLean* agt. *Cole*, 13 Hun, 300.)

RES GESTÆ.

1. This action was brought to recover the amount alleged to be due to the plaintiff upon a sale of certain real estate made by his assignor to the defendant. Upon the trial the person who drew the deed was called as a witness and stated, against the defendant's objection and exception, that the grantor, at the time he was executing the deed (the grantee not being present) stated to the witness that the purchase-price had not been paid, but that the grantee had promised to pay it whenever he should be requested so to do. *Held*, that the statement did not constitute a part of the *res gestæ*, and should have been excluded. (*Trimmer* agt. *Trimmer*, 13 Hun, 182.)

SECURITY.

1. Although section 339 of the old Code authorized the court to dispense with or limit the security, required by sections 335, 336, 337 and 338 to be given upon an appeal, when the appellant was an executor, administrator or trustee acting in the right of another, yet

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when an executor without making any application to have the security limited or dispensed with gives the security in the ordinary form, the giving of such undertaking will be taken as an admission by him that he has sufficient assets applicable to the payment of the judgment appealed from, to satisfy the same. (*Yates* agt. *Burch*, 13 Hun, 622.)

SERVICE BY PUBLICATION.

1. An allegation in the complaint that the plaintiffs had been unable to effect service of a summons upon Warring, sr., and that he was keeping himself concealed out of the state to avoid service of summons, fails to show that he was, at the time of the commencement of this action, a non-resident of this state, having no property within this state, and therefore under the Code and the rules of the court, not liable to be served by publication or by substituted service. (*Sloan* et al. agt. *Waring* et al., ante, 62.)
2. Such an allegation brings the defendant within the second subdivision of section 185 of the Code of Procedure, which provides for service by publication. (*Id.*)
3. To complete the substituted service of a summons under the Code (sec. 136), where the order authorizing such service directs the mailing of a copy of the summons and complaint to the person to be served at his place of residence, which is specified in the order a publication of the summons and a deposit in the post-office addressed as required, is necessary, or, in lieu thereof, a personal service out of the state. (*Smith* agt. *Wells*, 69 N. Y., 600.)
4. Where, therefore, in such case, a copy of the summons and complaint is mailed and addressed to the defendant at a different place

from that stated in the order, and there is no personal service and no appearance of the defendant, the court acquires no jurisdiction; a judgment against such defendant is void; and a purchaser at a sale of real estate thereunder cannot be compelled to complete his purchase, where the defendant so defectively served has a definite interest, however small, in the land sold. (*Id.*)

SHERIFF.

1. Where a sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife, *held*, that the act of the sheriff was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property. That his liability was not affected by the fact that he claimed to levy upon, and in fact advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein. (*Alvord* agt. *Haynes*, 13 Hun, 26.)
2. A sheriff who has taken property by virtue of a warrant of attachment issued under the Code, is not entitled to poundage in case of a subsequent settlement of plaintiff's claim before any sale of the property by the sheriff. (*FOLGER* and *MILLER* JJ., dissenting.) (*Ger. Am. Bk.* agt. *M. R. Coal Co.*, 68 N. Y., 585.)
3. Section 243 of the Code, as amended in 1865, only allows poundage in case of a sale by virtue of the attachment before judgment; and then only in case a settlement has been had or a judgment recovered and collected in whole or in part in which cases poundage is to be estimated on the amount collected, or "the amount at which settlement is made." (*FOLGER* and *MILLER*, JJ., dissenting.) (*Id.*)

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4. In an action against a sheriff for failure to return an execution it may be proved in mitigation of damages that prior to the return day the plaintiff's interest in the judgment was levied upon by virtue of an attachment and was liable to be applied thereon. (*Wehle* agt. *Conner*, 69 N. Y., 546.)
5. Where a sheriff having an execution in his hands receives an attachment against the judgment creditor and by virtue thereof levies upon the judgment debt the attachment becomes a lien upon the judgment and execution, and all moneys collected upon the execution are liable to be applied toward the payment of any judgment recovered in the action wherein the attachment was issued; and, until the attachment is vacated, or the lien thereof in some manner discharged, it must be regarded as valid process and the sheriff has no right to pay over to the judgment creditor moneys collected on the execution. (*Id.*)
6. Where, therefore, it appears in an action against the sheriff for failure to return the execution that such a lien by attachment existed at the time of the commencement of the action plaintiff is only entitled to nominal damage. The defendant's failure to perform his duty, although not justified or excused does not entitle plaintiff to recover more than the damages he has actually sustained. (*Id.*)
7. Where the sheriff acted lawfully in levying the attachment the question whether he acted in bad faith, cannot be considered in such action, as the rights of the attaching creditors could not be affected thereby. (*Id.*)
8. *It seems* that in order to make a valid levy by virtue of the attachment when the sheriff himself holds the execution, it is not neces-

sary to serve notice of the property levied on as required by section 235 of the Code. (*Id.*)

SPECIAL PROCEEDINGS

See Costs.

Matter of Jetter, ante, 67.

1. On an appeal to the court of appeals, in a proceeding brought into the supreme court by a common law *certiorari*, directed to an officer or tribunal other than a court, the successful party is not entitled to costs as a matter of course; whether or not costs shall be awarded rests in the discretion of the court. (*People ex rel. Green* agt. *Smith*, 13 Hun, 227.)
2. A proceeding under the statute in relation to voluntary assignments by imprisoned debtors (2 R. S., 31 *et seq.*), is a special proceeding, as defined by the Code (secs. 1, 2, 3); and an order of special term therein discharging the petitioner is a final order, and is appealable to the general term, under the provisions of the act of 1854 (*chap.* 270, *Laws of 1854*), authorizing appeals in special proceedings. (ALLEN and MILLER, JJ., dissenting.) (*In re Brady*, 69 N. Y., 216.)

SPECIFIC PERFORMANCE.

See CONTRACT.

Balheimer agt. *Reichardt*, ante, 414.

1. Where vendee of lands, induced by fraudulent representations, accepts a conveyance, not including all the lands orally agreed to be conveyed, and pays the consideration and enters into possession, the statute of frauds is not a bar to an action to compel a specific performance of the oral agreement; and, although no improvements have been made by him

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upon the lands not included in the deed, he is not confined to relief in damages, but may have specific performance. (*Beardsley* agt. *Duntley*, 69 N. Y., 577.)

STATUTE OF LIMITATIONS.

1. Though the legislature may not pass a law impairing the obligation of contracts, it unquestionably has power to pass a statute which shall operate *retrospectively*, and sweep away any right of action that arose from a *tort*. (*Guillotel* agt. *The Mayor*, ante, 114.)
2. The injury alleged occurred on the 13th day of March, 1873. At that time sections 74 and 91 of the Code of Procedure provided that an action for an injury to the person might be brought within six years after the cause of action accrued. This action was not commenced until the 7th of April, 1877. Before the action was begun, and on the 26th day of May, 1876, the legislature amended the Code by enacting that an action for an injury to the person should be brought within one year. The defendant pleaded the one year statute of limitations.
Held, to be a good defense. (*Id.*)
3. The statute of limitations acts *retrospectively*, for the rule is that that statute of limitations which is in force at the commencement of the action governs the rights of parties therein. (*Id.*)
4. *It seems* that, if the effect of the statute impairs the obligation of contracts, the statute is *void*; but if the statute destroys a cause of action founded upon a *tort*, it is not for that reason *invalid*. (*Id.*)
5. A married woman claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by the father. *Held*, that the simple presentation of an account containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute. (*Cuck* agt. *Quackenbush*, 13 Hun, 107.)
6. In an action upon a note, the defendant claimed that the action was barred by the statute of limitations. The note was dated March 1, 1864, payable one year after date. Upon the back of the note were indorsements of interest in the handwriting of the testatrix, dated in 1865, 1866, 1867, 1868 and 1869, and May 9, 1870. The action was commenced April 12, 1876. *Held*, as the indorsements purported to have been made by the testatrix before the note was outlawed, they were admissible in evidence against the defendant, without proof of actual payment. (*Risley* agt. *Wightman*, 13 Hun, 163.)
7. Whether or not such payments were actually made was a question for the jury. (*Id.*)
8. Although in former times courts of equity refused to enforce stale demands, yet, since the adoption of the Code prescribing limitations for both legal and equitable actions, no court can refuse to entertain an action on account of the staleness of the demand, provided it be brought within the time prescribed by the statute. (*Derby* agt. *Yale*, 13 Hun, 273.)
9. A plea of the statute of limitations of another state or country, where a contract was made, is no bar to an action brought upon the

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contract; the *lex fori* governs. (*Miller* agt. *Brenham*, 68 N. Y., 83.)

10. A bank is not liable upon a certificate of deposit until after demand of payment; and therefore, the statute of limitations does not begin to run against it until demand is made. (*Howell* agt. *Adams*, 68 N. Y., 315.)

11. Defendants having purchased certain premises at a state sale, assigned the certificate to plaintiff contracting to make the payments thereafter to be made to the state, and to hold plaintiff "free from all payments, loss or damage on account of such payments." Defendant having failed to make the payments, the premises were resold, and plaintiff and her tenant were evicted. In an action upon the contract, the statute of limitation was pleaded as a defense; *held*, that the contract was broken by the eviction; and that the statute of limitations only commenced to run from that time. (*Taylor* agt. *Barnes*, 69 N. Y., 430.)

STOCK BROKER.

See WRITTEN INSTRUMENT.

Bickett agt. *Taylor*, *ante*, 126.

SUBROGATION.

1. It seems to be a settled rule of equity that if "A" owes "B" and he and "C" are bound for it, and "A" gives "C" a mortgage or bond to indemnify him, "B" shall have the benefit of it to recover his debt. (*Morgan et al.* agt. *Francklyn*, *ante*, 244.)
2. But a private arrangement as to the liability of sureties, as between themselves, comes neither within the rule nor the principles upon which it rests. (*Id.*)
3. The complaint alleged that the

plaintiffs, who are bankers, issued letters of credit to the Atlantic De Laine Co. Hoyt, Spragues & Co. guaranteed to plaintiffs that the De Laine Co. would keep its contract, and in default thereof H., S. & Co. would hold plaintiffs harmless of loss. E. H., who was a member of the firm of H., S. & Co., guaranteed to his said firm the payment of any and all sums of money which should remain due and owing to said H., S. & Co. after all the property of the Atlantic De Laine Co. should have been applied to the payment of the debts of said company, the intention of said guaranty being to secure to H., S. & Co. the payment in full of any ascertained balance of account due them by said Atlantic De Laine Co.; and in case of his death his personal representatives were to pay such ascertained balance, for which he would be liable under the above guaranty, without delay, out of his assets in their hands applicable to the payment of his debts. The plaintiffs ask as relief that the balance of account due to H., S. & Co. from the Atlantic De Laine Co. may be ascertained and determined, and that the plaintiffs may be adjudged to be subrogated to all rights of said H., S. & Co. to collect the said balance so to be ascertained from the executors of E. H., and that said executors be directed to pay the assets in their hands applicable to the payment of the debts of said E. H. to the plaintiffs to the extent necessary to satisfy their claims and demands. On demurrer to the complaint by the executors of E. H.: *Held*, that the action would not lie. E. H. was, in no just sense, a principal. The only principal was the Atlantic De Laine Co. H., S. & Co. were sureties.

Held, further, that H.'s guaranty was to secure an ascertained balance, and it is only when all the property of the De Laine Co. shall have been applied in payment of its debts that, within the terms of

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the guaranty, the balance becomes *ascertained*. (*Id.*)

4. Where the carrier has advanced the charges of an antecedent carrier, who transported the goods under an independent contract, he becomes subrogated to the rights of the latter, and may recover such advances, although he fails to perform his own contract; and the fact that his bill of lading is for transportation and delivery upon payment of freights and charges, does not deprive him of such right. (*W. Tr. Co. agt. Hoyt*, 69 N. Y., 230.)
4. What is "*satisfactory proof*," fully discussed. (*Id.*)
5. The attempts to serve the summons were all made during August, 1877. The new Code took effect September 1, 1877. On that day plaintiff's attorney called on defendant's attorney, and at his request made a slight change in the summons to conform to the new Code. Defendant objects that the summons which was attempted to be served during August was not the identical paper served under the order, and consequently if there was any attempt to evade the service of a process, it was not that one which was served.

SUBSTITUTED SERVICE.

1. Where a summons was issued in August, 1877, and all the attempts which had been made to serve the same were prior to the 1st of September 1877, at which time the Code of Civil Procedure took effect:

Held, that a proper case was made out for the order for substituted service, under section 435, on proof that such attempt *had* been made, and that she avoided service, so that personal service could not be made. (*McCarthy agt. McCarthy*, ante, 418.)

2. The facts necessary to be proven before the order can be granted must exist at the time of the application, as the language plainly imports, and nothing in the words imply, that the avoiding of service must have occurred after a certain date. (*Id.*)
3. The proof required by section 435, on which to found the order for substituted service, need not necessarily be direct and positive, but "*satisfactory proof*." Such proof as satisfies the mind of the judge to whom the application is made, that the state of facts exist which entitles him to make the order. (*Id.*)

Held, that this objection was untenable. The summons was, still even after the change, the old summons amended; and even if it had not been, that fact would have made no difference. The loss of the identical paper which was attempted to be served would not render nugatory these attempts at service. Upon the establishment of the effort to avoid the service the right to the order depends, and not upon the identity of the papers, so long as either, if served, would commence the same and not a different action. (*Id.*)

SUMMARY PROCEEDINGS.

1. In summary proceedings instituted to remove the relator from certain premises, on the ground that he was holding over after the expiration of his term, he made an affidavit stating that on the day on which the respondent alleged that the lease was made he executed and delivered to the respondent an absolute deed of the premises, and he and the respondent executed an agreement by which he agreed to buy the premises for a price therein named, to be paid on the day the lease expired, and also executed the lease upon which the proceedings were instituted; that said instruments

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were all given at the same time to secure the repayment of a sum of money loaned to him by the respondent, and were in fact a mortgage; that upon the said loan usurious interest was reserved, the payment of which was secured by the said lease. *Held*, that it was competent for the relator to establish in such proceedings that the instrument purporting to create the relation of landlord and tenant between himself and the respondent was in fact a mortgage to secure the repayment of a loan. That it was also competent to show that such instrument was given to secure a usurious loan, and was therefore void. That the establishment of either of these facts would require the proceedings to be decided in his favor. *Seemle*, that in summary proceedings it would not be competent to establish by parol evidence that a deed absolute upon its face was intended as a mortgage. Where, however, the affidavit does not specify the kind of evidence by which it is expected to establish this fact, it must be presumed that it will be proved by competent evidence. (*People ex rel. Ainslee agt. Howlett*, 13 *Hun*, 138.)

SUMMONS.

1. The provisions of section 417 of the Code of Civil Procedure as to what the summons must contain are mandatory, (*Osborn agt. McCloskey*, ante, 345.)
2. Where a summons is served in an action in the supreme court without naming the county where the plaintiff desires the trial to be had it will be set aside, on motion, as irregular and void. (*Id.*)
3. Where a summons was issued in August, 1877, and all the attempts which had been made to serve the same were prior to the 1st of September, 1877, at which time the

Code of Civil Procedure took effect :

Held, that a proper case was made out for the order for substituted service, under section 435, on proof that such attempt had been made, and that she avoided service, so that personal service could not be made. (*McCarthy agt. McCarthy*, ante, 418.)

4. The facts necessary to be proven before the order can be granted must exist at the time of the application, as the language plainly imports, and nothing in the words imply, that the avoiding of service must have occurred after a certain date. (*Id.*)
5. The proof required by section 435 on which to found the order for substituted service, need not necessarily be direct and positive, but "satisfactory proof." Such proof as satisfies the mind of the judge to whom the application is made, that the state of facts exist which entitles him to make the order. (*Id.*)
6. What is "satisfactory proof," fully discussed. (*Id.*)
7. The attempts to serve the summons were all made during August, 1877. The new Code took effect September 1, 1877. On that day plaintiff's attorney called on defendant's attorney, and at his request made a slight change in the summons to conform to the new Code. Defendant objects that the summons which was attempted to be served during August was not the identical paper served under the order, and consequently if there was any attempt to evade the service of a process, it was not that one which was served. *Held*, that this objection was untenable. The summons was, still even after the change, the old summons amended : and even if it had not been, that fact would have made no difference. The loss of the identical paper which was at-

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tempted to be served would not render nugatory these attempts at service. Upon the establishment of the effort to avoid the service the right to the order depends, and not upon the identity of the papers, so long as either, if served, would commence the same and not a different action. (*Id.*)

8. One Treat, the president and superintendent of a street railway in Auburn, was, on June 1, 1876, employed by the president of the defendant, a steam railroad company, to superintend the running of horse cars on a portion of defendants road not yet completed. Treat had no authority to make contracts for the defendant, except to purchase horses and feed; nor had he any control over or knowledge of the affairs of the defendant, or its books; his employment was to continue during the president's pleasure. *Held*, that a summons, in an action against the defendant, could not be served upon him as its "managing agent." (*Emerson agt. Auburn and Owasco Lake R. R.*, 18 Hun, 150.)

9. To complete the substituted service of a summons under the Code (*sec.* 185), where the order authorizing such service directs the mailing of a copy of the summons and complaint to the person to be served at his place of residence, which is specified in the order, a publication of the summons and a deposit in the post-office, addressed as required by the order, is necessary, or, in lieu thereof, a personal service out of the state. (*Smith agt. Wells*, 69 N. Y., 600.)

10. Where, therefore, in such case, a copy of the summons and complaint is mailed and addressed to the defendant at a different place from that stated in the order, and there is no personal service and no appearance of the defendant, the court acquires no jurisdiction; a judgment against such defend-

ant is void; and a purchaser at a sale of real estate thereunder can not be compelled to complete his purchase where the defendant so defectively served has a definite interest, however small, in the land sold. (*Id.*)

SUPPLEMENTARY PROCEEDINGS.

1. In order to authorize the making of an order before execution returned requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply his property to the satisfaction of the judgment, and has been refused by him. (*First National Bank agt. Wilson*, 18 Hun, 232.)

2. The power to punish as for a contempt the disobedience of an order granted by a county judge in proceedings supplementary to execution issued upon a judgment in the supreme court requiring the judgment debtor to appear and answer concerning his property does not vest exclusively in the county judge; the supreme court has concurrent jurisdiction and power to punish. (*Tremain agt. Richardson*, 68 N. Y., 617.)

3. Where a judgment creditor, at whose instance a receiver has been appointed in supplementary proceedings, instigates and conducts a prosecution against third persons through the receiver for his own benefit, and in which he is solely interested, in case he is defeated he is liable for costs. (*Ward agt. Roy*, 69 N. Y., 96.)

4. An attorney employed to collect a claim has authority by virtue of his original retainer, after he obtains judgment, to institute supplementary proceedings thereon, and to procure the appointment

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of a receiver; these are proceedings in the suit. (*Id.*)

5. But it seems he has not authority by virtue of such retainer to commence an action in the name of the receiver against a third person, to set aside as fraudulent a conveyance from the judgment debtor. (*Id.*)
6. The F. S. M. Co., a foreign corporation, had a general office in New York in charge of B. as agent. He had charge of collections in this state and employed an attorney to collect a promissory note in his possession, belonging to the company. The attorney obtained judgment and instituted supplementary proceedings thereon, in which plaintiff was appointed receiver. This action was brought by and at the instance of said attorney to set aside as fraudulent a conveyance by the judgment debtor to defendants. B. did not authorize and was not informed of the commencement of the action; he was, however, advised thereof before trial, and recognized the action of the attorney as being for the company. Defendants succeeded in their defense, and moved that the company be compelled to pay the costs. *Held*, that the facts justified the inference that the company, through B., with a knowledge of all the attorney had done, ratified his acts, and it was bound by them, although the attorney had no authority originally to commence the action; and that the company was properly charged with the costs. (*Id.*)
7. Upon the first hearing of the motion, the company appeared generally by attorney, and consented to a reference to take testimony, without taking the objection that the court had no jurisdiction over it; *held*, that the objection could not be taken thereafter. (*Id.*)

SURETY.

See Costs.

Browning agt. *Vanderhoven et al.*
ante, 97.

SURVIVORSHIP.

1. Where the testatrix and her two grandchildren were lost in a shipwreck, and it appearing that a wave bore the testatrix from the saloon in which the children were with her, and she was not seen afterwards alive, the grandchildren being seen alive a few minutes afterwards, when the saloon, with its inmates, was carried away: *Held*, that while from such facts it cannot be said to be absolutely certain that the testatrix died first, yet under the case of *Pell* agt. *Ball* (1 *Cheves* Eq. [S. C.], 99), the evidence might justify such conclusion. (*Stinde* agt. *Ridgway*, *ante*, 301.)
2. The burden of proving a survivorship rests upon the party who claims through it. (*Id.*)

TENDER.

1. A mortgage debtor must seek his creditor to pay the interest on his mortgage, if he is within this state, and for this purpose must go to the residence or place of business of the mortgagee. (*Grussy* agt. *Schneider*, *ante*, 188.)
2. A tender of interest, if not made to the creditor, must be to one authorized by him to receive it (S. C., 50 *How. Pr.*, 184 [where the facts appear], affirmed). (*Id.*)
3. On November, 15, 1875, the parties to this action entered into an agreement, whereby the plaintiff agreed to sell certain land to the defendant, and to deliver the deed on December fifteenth, the defendant to pay on that day a note for

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\$500, given when the contract was signed, and \$3,800 in cash, being the balance of the purchase-money. In an action by the plaintiff upon the note, given at the time of the signing of the contract, *held*, that it rested upon her to prove a performance or tender of performance of the contract upon her part, and that, failing so to do, she was not entitled to recover. (*Hoag* agt. *Parr*, 13 *Hun*, 95.)

4. There being no place specified in the contract for the delivery of the deed and the payment of the money, and the defendant being a resident of this state, the plaintiff was bound to find the defendant and make a tender to him personally, or at least to show that after thorough efforts and inquiries he was unable to find him. (*Id.*)
5. In order to excuse a personal tender, it must appear that the defendant was out of the state, beyond plaintiff's reach, or else that he intentionally avoided him or kept out of his way. (*Id.*)

TRADE-MARK.

1. No man should be allowed to sell his goods as the goods of another, nor should he be permitted so to dress his goods as to enable him to induce purchasers to believe that they are the goods of another. (*Enoch Morgan's Sons' Company* agt. *Schwachhofer*, ante, 87.)
2. Courts will interfere when it is apparent that there is an imitation of the plaintiffs' label, whether as to color, shape or inscription, which imitation is calculated and intended to deceive the general public. (*Id.*)
3. Where it appeared that the plaintiffs had been for many years engaged in manufacturing *sapolio*; that the article had acquired a great reputation and that the plaintiffs had expended very large sums of money in advertising;

that the defendant after analyzing a cake of *sapolio* and ascertaining how it was made set about making an article similar in character, color and appearance to that of the plaintiffs:

Held, that although he might possibly have a right to do this, yet when the court finds that the defendant after having possessed himself of the secret of the manufacture of the plaintiffs has, in addition, coined a name much resembling *sapolio* in appearance and which he admits is a fancy name, having no particular derivation or signification, and has then proceeded to encase his cakes of *saphia* in wrappers also closely resembling the plaintiffs, both in their external and internal appearance as to color, size, and partially as to inscription and directions for use, the court has the power to interfere and should exercise its power.

Held, further, that plaintiffs are entitled to an injunction restraining the defendant from vending *saphia* in the blue package in which it is now sold. (*Id.*)

4. Although it was not the intention of the court to decide that the defendant had not the right to manufacture and also sell *saphia*, nor to restrain him from the use of that name, or of the figure or device upon the label, yet it was the intention of the court that the defendant should abstain from dressing his goods in wrappers so closely resembling the plaintiffs' as to enable him to perpetrate a fraud. (*Id.*)
5. An equitable action will not lie to restrain the defendant from interfering with the business of plaintiff by the publication of a circular alleged to contain false and fraudulent representations that certain parties are infringing his trade-mark rights by placing on the market imitations of his soft capsules and warning the trade that the defendant had the

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exclusive right to use the trade-mark, "soft capsules," according to law, and that he would promptly punish, to the full extent of the law, any encroachments on his rights. (*Mauger* agt. *Dick*, ante, 132.)

6. The jurisdiction of a court of equity does not extend to false representations as to the character or quality of the plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander. (*Id.*)

7. Equitable jurisdiction to restrain the use of a name, or a trade-mark or letters, rests upon the ground of plaintiff's property in his name, trade-mark or letters and of the unlawful use thereof. (*Id.*)

8. Even admitting that the contents of the circular were false, that fact does not confer jurisdiction. (*Id.*)

9. In an action brought by plaintiffs, who compose the firm of "Devlin & Co.," to restrain defendant from using their firm name, an injunction order was granted restraining defendant from displaying upon signs, etc., said firm name, and confining him to the use of his own "proper Christian and surname conjoined," without devices which may tend "to mislead or induce the public to believe or suppose that he is the plaintiffs." Defendant thereafter put out a sign, upon which was "Devlin's clothing;" over the word "Devlin's" were defendant's initials, "J. S.," with the number of his store "836" on each side of the initials. *Held*, that the facts justified a finding that the words and letters were so arranged as to deceive, and were so intended; and that an order adjudging defendant guilty of contempt was proper. (*Devlin* agt. *Devlin*, 69 N. Y., 212.)

10. In an action to restrain the infringement of plaintiffs' trade-

mark, the complaint alleged that plaintiffs manufactured brandy which they put up and sold in "quart and pint bottles," and upon the bottles put the trade-mark in question. The court found that defendants pirated plaintiffs' trade-mark, but found that plaintiffs did not use quart or pint bottles as alleged in their complaint, they falsely and deceitfully using bottles pretended and represented to be "quart and pint," which did not hold that quantity, and that the trade-mark was designed and used to protect the fraud, and upon this ground dismissed the complaint. This ground was not set up in the answer, and did not appear to be litigated on the trial. Nothing appeared upon the bottles, which were transparent, to indicate the quantity contained, nor did it appear that such bottles were used in the trade as measures of quantity, or that purchasers did not understand perfectly their capacity, or that plaintiffs ever represented that they contained quarts and pints, or that they ever deceived any one, or that the trade-mark was or could be used to deceive. It appeared that plaintiffs' brandy is imported, and is entered at the custom-house with the true quantity stated, and that the bottles are of the ordinary size used in the trade. *Held*, that the findings of fact and conclusion therefrom were erroneous. (*Hennessy* agt. *Wheeler*, 69 N. Y., 271.)

11. The cases holding that no equitable relief will be granted where a trade-mark is used to deceive, or is upon a worthless or deleterious compound, or where the business in which it is used is carried on in a systematically dishonest or fraudulent way, distinguished. (*Id.*)

TRIAL.

1. No question, either of fact or of law, arising upon a trial — *a. g.*,

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- an objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery, can be reviewed upon appeal, except upon a case made and settled according to the established practice. (*McLean* agt. *Cole*, 13 *Hun*, 300.)
2. In an action upon an assigned claim, plaintiff's counsel requested the court to direct a verdict for plaintiff; the court denied the request, submitting, however, to the jury simply the question as to the right of the plaintiff to maintain the action, and charging that if the transfer was "a sham instrument," plaintiff should be defeated; if not, that he was entitled to recover. Plaintiff's counsel excepted to the refusal to direct a verdict. *Held*, that the exception was sufficient to present the question as to plaintiff's right to maintain the action. (*Sheridan* agt. *Mayor, &c.*, 68 *N. Y.*, 80.)
3. Where there is no conflict of evidence as to the material facts in a case, or any doubtful inferences to be deduced from the facts proved, or any exception, except to a decision denying a motion for a nonsuit, it is proper for the court to direct a verdict subject to the opinion of the court at general term. (*Howell* agt. *Adams*, 68 *N. Y.*, 314.)
4. In an action seeking to charge defendant as a partner with an individual banker, plaintiff offered in evidence a paper purporting to be a certified copy of a certificate filed in the banking department, in accordance with the provisions of the banking act of 1854 (*sec. 6, chap. 242, Laws of 1854*), signed and acknowledged by defendant, certifying that he was interested in the business of the bank, &c. No objection was made to the reception of the paper in evidence. *Held*, that the objection could not be raised upon appeal that the statute only made the original certificate evidence, or that no proof was given that the original certificate was signed by defendant; that these objections, to be available, should have been taken on the trial; also that they were not raised by an exception to a denial of a motion for a nonsuit based on the general ground that no partnership had been shown. (*Id.*)
5. Where a portion of a charge, which is excepted to, is erroneous, the failure to except to other portions presenting similar erroneous propositions, which were not conceded, but disputed on the trial, does not cure the error in the part which is excepted to. (*Tyler* agt. *Brock*, 68 *N. Y.*, 419.)
6. Where, upon the trial of an action by a referee, a motion is made on the part of defendant, at the close of the evidence, to dismiss the complaint, which is not passed upon at the time, and the referee subsequently makes his report with findings of fact adverse to plaintiff, and as a conclusion of law finds that the complaint be dismissed, this cannot be considered the same as a nonsuit, but as a disposition of the case upon a consideration of all the testimony. (*Van Derlip* agt. *Koyser*, 68 *N. Y.*, 448.)
7. Assuming that, upon a motion to dismiss the complaint at the close of the testimony, a question arises, the same as upon a motion for a nonsuit, a distinct ruling must be had at the time, or as of the time the motion was made, and before the final submission of the whole case, and an exception taken in order to raise the question that the decision was, as matter of law, that there was no evidence to sustain the complaint; or, at least, a request should be made that the referee decide the motion as of that time, and an exception be taken to a refusal. Exceptions merely taken to the ref-

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eree's findings of fact and to his conclusions of law do not present the point. (*Id.*)

8. Where, upon the trial of an action, the court directs a verdict for defendant, an exception to the ruling, in the absence of anything from which it may be implied that the right to go to the jury has been waived, is sufficient to present the objection on appeal, that there were questions of fact which should have been submitted to the jury; it is not necessary to request that any fact be so submitted. (*Trustees, &c., agt. Kirk, 68 N. Y., 459.*)

9. In an action for work and labor done under a contract, the court charged, among other things, in substance, that if the work was not fully completed plaintiff was entitled to recover for the work actually performed, as defendant had taken possession, and all he could claim was a deduction for what he had to pay for completing the work. *Held*, error; and that it was not cured by a finding of the jury that plaintiff had fully performed. (*Flood agt. Mitchell, 68 N. Y., 508.*)

Where a party offers to prove certain facts by documentary evidence, for the purpose of ruling upon the offer, it must be assumed that the evidence would establish the facts stated unless this can be said to be impossible; and if it is proper to prove the facts, the rejection of the evidence is error. (*See N. Y., D. & P. Est'mt agt. Berdell [Mem.], 68 N. Y., 613.*)

Where improper evidence is received upon a point which is afterwards abandoned, and this is so stated in the charge of the court, the error is cured. (*See Bloomer agt. Morris [Mem.], 68 N. Y., 623.*)

Defendant, as a witness, was asked on cross-examination, if he had stated the facts in the case to his

counsel, this was objected to as calling for a privileged communication; objection overruled and exception; *held*, that the objection was premature and did not present the question as to whether defendant could be compelled to testify to the conversation. (*See Ross-Lewin agt. Redfield [Mem.], 68 N. Y., 627.*)

10. Plaintiff, in an action to recover rent, alleged in his complaint that he assigned the rent for two months to M., who thereafter re-assigned to him; no proof of the transfers was made. Defendant's counsel requested the court to charge that plaintiff could not recover for two months, which was refused. *Held*, no error. (*Thomas agt. Wilson, 69 N. Y., 118.*)

11. Errors in a refusal to charge must be shown affirmatively, and can only be predicated upon a refusal to charge some specific proposition. (*Distin agt. Rose, 69 N. Y., 123.*)

12. Where an answer in an action of slander alleges, in justification, the truth of the words spoken, it is not error for the court to refuse to charge, as matter of law, that the answer cannot be considered by the jury to enhance the damages. (*Id.*)

13. After the court had charged, in an action for slander upon request, "that the burden of proof is on the plaintiff to prove the charge alleged," it refused to add the words "and over and beyond the evidence given on the part of the defendant." *Held*, no error; that the refusal to charge might be justified on the ground of uncertainty as to the meaning of the request; but the charge as made covered the whole case. (*Id.*)

14. An objection to evidence, taken under commission, that the commission was not executed by the person intended, should be raised

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- by motion to suppress where the party has an opportunity so to do; if not so raised it will be deemed to have been waived; it cannot be raised upon the trial where the party had knowledge of the fact a sufficient time before the trial to enable him to make the motion. (*Newton* agt. *Porter*, 69 *N. Y.*, 183.)
15. Where a verdict is ordered subject to the opinion of the court at general term, without qualification, exceptions cannot be heard, and the only question for the general term is, which party is entitled to final judgment on the uncontroverted facts; no new trial can be granted, but final judgment must be rendered for one party or the other without regard to which party had the verdict. (*Durant* agt. *Abendroth*, 69 *N. Y.*, 148.)
16. Such a direction is, therefore, improper where exceptions have been taken upon the trial, or where the facts are controverted. (*Id.*)
17. Where such an order also directed exceptions to be heard at first instance at general term: *Held*, the use of the words, "Subject to the opinion of the court at general term," did not deprive the unsuccessful party of the benefit of his exceptions; but that said words were mere surplusage. (*Id.*)
18. In such a case findings of fact by the general term are unauthorized and cannot be regarded; but being mere surplusage they do not vitiate a judgment. (*Id.*)
19. Where specific objection is made to evidence offered, every ground of objection not specified which is capable of being obviated by evidence, is waived. (*Marston* agt. *Gould*, 69 *N. Y.*, 231.)
20. Where, upon a trial, an objection has once been directly raised and overruled, it need not be repeated to the same class of evidence; and an omission to repeat it is not a waiver. (*Dilleber* agt. *Home L. Ins. Co.*, 69 *N. Y.*, 257.)
21. It is not the duty of a party to a civil action to call every person as a witness who may give material evidence in his favor, and the mere omission on his part to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and give evidence, is not necessarily so suspicious as to authorize an inference that the testimony of the witness, if he had been produced, would have been adverse to the party. (*Bleecker* agt. *Johnston*, 69 *N. Y.*, 309.)
22. In an action against copartners upon an alleged contract of employment, plaintiff and one of the defendants were the only witnesses; their testimony was directly in conflict; the court charged in substance that it was the duty of defendants to produce the other defendant as a witness; and not having done so, that the jury might infer that his evidence would have been prejudicial to them. *Held*, error. (*Id.*)
23. The by-laws of defendant, a savings bank, which were printed in its customer's deposit book, contained the following: "The bank will use its best efforts to prevent fraud; but all payments made to persons producing the deposit books shall be deemed good and valid payments." It was also provided that drafts might be made personally or by order in writing of the depositor if the bank have his signature on the signature book. Plaintiff was a depositor, and defendant had his signature in such book. The wife of plaintiff wrongfully obtained possession of his deposit book, which she presented with a forged check or order, for \$3,850, and this sum was paid to her. In an action to recover the amount,

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the order and the signature book were produced on the trial. Defendant's own officers, as witnesses, stated that there was a difference between the signature to the order, and that in the signature book. The court declined to charge that the payment was valid, but left it to the jury to determine whether defendant used its best efforts to prevent fraud. *Held*, that as this court had not the benefit which the trial court had of the inspection of the signatures, it could not say but that said court, on inspection, discovered such a difference as with the other circumstances of the case, authorized an inference of negligence and made a submission of the question to the jury proper. (*Allen* agt. *Williamsburgh Savings Bank*, 69 N. Y., 814.)

24. Also *held*, that a request to charge, that if the defendant exercised ordinary care and diligence, and paid in good faith, it was excused, was properly refused, as defendant had obligated itself to exercise more than ordinary care, i. e., its "best efforts." (*Id.*)

25. It is not to be assumed that extrinsic facts alleged as the foundation of an objection to the competency of a witness are true, as that he has been convicted of felony; and when no evidence is offered to sustain the objection, and it is overruled, it is to be assumed it was because no foundation was laid for it. (*Hoerson* agt. *Vanderpool*, 69 N. Y., 510.)

Where upon trial the only question raised is as to plaintiff's right to recover any thing an exception to a decision thereof in favor of plaintiff, does not present for review any question as to amount. (*See Jarvis* agt. *Driggs*, 69 N. Y., 143.)

Defect in parties plaintiff not taken by answer demurrer will be deemed

to have been waived and cannot be taken on trial. (*See Davis* agt. *Beckstein*, 69 N. Y., 440.)

When point sufficiently covered by charge, the court not bound upon request to repeat. (*See De Wolf* agt. *Williams* [Mem.], 69 N. Y., 631.)

TRUSTS.

1. The purposes of a trust of personal property stand as at common law, and are not limited by statute, subject nevertheless to the rule against the suspension of ownership for more than two lives (*Gilman* agt. *Reddington*, 24 N. Y., 13; *vide note at end of this case*). (*De Peyster* agt. *Beckman*, ante, 90.)

2. The fact that more than two *cestui que trust* might enjoy the benefit of the trust for life, and that one of the designated beneficiaries was not in being at the time of the creation of the trust, does not invalidate it, when the duration of the trust could in no event extend beyond the life of the creator of the trust. (*Id.*)

3. The executors, &c., of a deceased trustee of personal property succeed to the trust, and in case an application be made to appoint a new trustee, they are the proper persons to initiate the proceedings. It is not necessary that the creator of the trust should be notified of the application. (*Id.*)

UNPUBLISHED MANUSCRIPT.

1. The supreme court of this state has jurisdiction and authority to grant an injunction, at the suit of a resident plaintiff, against a non-resident defendant, restraining him from performing or exhibiting a drama, in a foreign state, in violation of plaintiffs' rights, where the summons and the injunction order are served on defendant, while he is temporarily

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in this state. (*French agt. Maguire, ante*, 471.)

2. The constitution of this state has given this court general jurisdiction in law and equity. And, under so broad a grant of authority, where it regularly acquires, by the service of its process, control over the parties, it must have authority to adjudicate upon their rights, in actions of this description. All that is required for that purpose is to affect and restrain their action, and that may properly be done wherever the party to be affected may be found and served with process. It is not an exercise of mere local, but an element of general, jurisdiction. (*Id.*)
3. An omission by a defendant, to deny facts which are entirely and peculiarly within his knowledge, will be regarded as sufficiently confirming them, to justify the court in acting upon the hypothesis of their truth. (*Id.*)
4. Where the plaintiffs alleged that they had acquired title to the unpublished drama, known as "Diplomacy," for the purpose of producing and exhibiting it within the United States, and that, in violation of their rights, the defendant is about producing it in a theater controlled by him in the city of San Francisco; then setting forth the agreement or contract of sale:
Held, that the fact that the sale relied upon in support of the action was made, may properly be assumed from the agreement which appears to have been so authenticated as to establish the fact of its genuineness. (*Id.*)
5. As a general proposition, it is legally true, that *mere information* as to the existence of the rights relied upon will not justify the issuing of an injunction. But when the informant is beyond the power of the court because of his residence in a foreign country, and where action more prompt than is consistent with the long delay necessary to obtain the affidavits of these foreign informants is required for the protection of the plaintiff's rights, the court may act upon this information and issue an injunction, especially where the information itself is sustained and rendered entirely credible by circumstances well established in the case. (*Id.*)
6. To protect a person in the possession of an unpublished manuscript, the law does not require that it shall be the exclusive work of one individual. It may be that of one or many, acting in co-operation, and, whichever may be the case, the right is substantially the same, and the person is equally entitled to the protection of courts of justice. The same reasons that will induce security to the individual will extend it to all whose joint action may contribute to the result finally attained. (*Id.*)
7. By the common law, authors were protected in the enjoyment of the pecuniary benefits of their literary productions. (*Id.*)
8. The law still continues to maintain and protect the right of the author to his unpublished manuscript or composition, the same as it formerly did, independent of the statutes concerning copyrights. (*Id.*)
9. Exhibiting the manuscript or composition to others, or, where it may be adapted to that end, performing it by theatrical representations is not deemed sufficient to constitute the publication which will deprive the author of his exclusive right. (*Id.*)
10. Reading, exhibiting or performing, will permit the observer to appropriate to himself so much as his memory may be capable of retaining. (*Id.*)

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11. But it will not allow the hearer and observer to appropriate and use the entire composition, with its incidental stage accompaniments. That right is in the author and his assignee. (*Id.*)

UNDERTAKING.

1. As to whether, where a party, who has availed himself of an undertaking by prosecuting it to judgment, can thereafter maintain an action against a surety there-to for deceit, based upon the alleged falsity of the affidavit of justification, *quære*. (*Cormier agt. Hawkins, 69 N. Y., 188.*)
2. It is not essential to the validity of an undertaking given by the plaintiff in an action to recover possession of personal property in apparent conformity with the provisions of the Code in reference thereto (*sec. 209*), that the undertaking be delivered to the sheriff as required by said provision, or that the statutory proceedings be taken and the undertaking used to accomplish the purpose for which the statute requires it to be given. (*Harrison agt. Wilkin, 69 N. Y., 412.*)
3. The parties to the action may waive the formalities of the statutory proceedings, and in such case the sureties to the undertaking are bound by the waiver, and are estopped from questioning the recitals in the undertaking, and this although they had no knowledge of the facts that the proceedings were not to be taken and the undertaking used in the manner prescribed by the statute. (*Id.*)
4. Accordingly *held*, where in pursuance of an arrangement between two parties, one of whom had in its possession personal property claimed by the other, an action was brought by the former in the form of an action to recover possession of the property, and an undertaking was given, entitled in the action, reciting that plaintiff claimed delivery of the property, and undertaking to prosecute the action and to return the property, if return should be adjudged, &c., that the sureties to the undertaking were estopped, in an action thereon, from questioning the recital, although they had no knowledge that the defendants in the replevin suit were not in possession of the property, or that the statutory proceedings were not to be had, or the undertaking used to obtain delivery. (*Id.*)

USE AND OCCUPATION.

1. An action for use and occupation does not lie against a principal where there is an outstanding lease in the name of the agent. (*Kiersted et al. agt. Orange and Alexandria R. R. Co. et al., ante, 51.*)
2. In such case there must be proof of an assignment of the lease in writing by the agent to the principal, or proof of a surrender of the lease by the agent and its acceptance by the landlord before he can recover. (*Id.*)

USURY.

1. Upon the loan of money to be secured by a chattel mortgage on copy-rights, music plates, &c., &c., a printing contract between the parties being made at the same time, by which it was agreed that the mortgagees might print music from the plates of the mortgagor, the expense of printing and materials to be borne by the mortgagees, the profits from the music so printed to be divided equally between the parties, it appearing that the loan of the money and the printing contract were part and parcel of one general arrangement in the beginning, but were in fact made afterwards divisible,

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and after the mortgage was executed, and before the printing contract was made, the option was given to the mortgagors to give up the printing agreement, but they desired it to be made.

Held, that the transaction was not usurious. (*Hall* agt. *Ditson*, ante, 19.)

2. *Clark* agt. *Sheehan* (47 N. Y., 188) applied. (*Id.*)

3. It is not *usury* for an insurance company making a loan upon real estate, at the same time to make an insurance upon the life of the borrower or those of his friends. (*John Hancock Mutual Life Ins. Co.* agt. *Nichols*, ante, 398.)

4. *It seems* that this is so, although the taking of the policies was used as an inducement for making the loan, provided the policies were actually issued and the premium charged was the usual and fair premium. (*Id.*)

5. An obligation, valid in its inception, is not invalidated by an usurious agreement for the extension of the time of payment; but the sum paid on the agreement for forbearance will in equity be applied as payment. (*R. E. Trust Co.* agt. *Keech*, 69 N. Y., 248.)

6. Where the defense of usury is interposed, the affirmative of the issue is upon the defendant, and where the case is tried by a referee and the transaction is equivocal, defendant must give evidence of facts showing the alleged illegal intent, and have the fact found by the referee; it cannot be adjudged in the first instance by this court on appeal. (*Haughwout* agt. *Garrison*, 69 N. Y., 889.)

7. In an action upon guarantees of certain bonds, where the defense was usury, the referee found in substance that plaintiffs having commenced legal proceedings against defendant S., and caused

his property to be attached, S. agreed to settle by paying his indebtedness and the costs and expenses of the proceedings; that plaintiffs presented their account, in which they charged \$500 counsel fees, claimed to have been paid or incurred in the proceedings, and refused to release the attachment unless it was paid; that S. thereupon allowed the same, and the bonds in question, with guarantees, were given on the settlement. There was no finding or request to find that the \$500 was paid as a consideration for forbearance and that it was plaintiff's intent to exact usurious interest. *Held*, that the question of usury could not be raised upon the record. (*Id.*)

VERDICT.

1. The practice of directing a *pro forma* verdict at circuit, and reserving the cause for further argument and consideration to be had on a motion made on the judge's minutes to set aside the verdict, and on the hearing of such motion directing judgment in favor of the party entitled thereto, approved. (*Hall* agt. *Hall*, 18 Hun, 806.)

VOLUNTARY APPEARANCE.

1. The want of process to bring a defendant into court may be waived by a voluntary appearance in the action; but to be effectual, such appearance must be with knowledge that there is an action pending and with a full intention to appear therein. (*Merkus* agt. *City of Rochester*, 13 Hun, 157.)
2. The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, unless he notify him that an action is pending against him and unless he fully understands the nature of the proceedings. (*Id.*)

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WAIVER.

See INSURANCE (FIRE).

Lasher agt. *Northwestern National Insurance Co.*, ante, 324.

1. During a trial, the court having adjourned, one of the jurors, who lived twelve miles from the courthouse, asked the plaintiff to let him ride home with him. The plaintiff assented and the juror rode with him about ten miles, in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused, if defendant's counsel so desired. Defendant's counsel stated he was willing to leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would, in any event, have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof. (*Gale* agt. *N. Y. C. and H. R. R. Co.*, 13 *Hun*, 1.)

2. A defendant, by its answer, denied its liability for any part of the loss under an insurance policy which provided for an arbitration in case of disagreement as to amount of loss, on grounds specifically stated therein. *Held*, that it thereby waived the condition requiring an arbitration, as the amount of the loss was immaterial, if the company insisted that it was not liable for any portion thereof. (*Gibbs* agt. *Continental Ins. Co.*, 13 *Hun*, 611.)

3. Where specific objection is made to evidence offered, every ground of objection not specified which is capable of being obviated by evi-

dence, is waived. (*Marston* agt. *Gould*, 69 *N. Y.*, 231.)

4. Where, upon a trial, an objection has once been distinctly raised and overruled, it need not be repeated to the same class of evidence; and an omission to repeat it is not a waiver. (*Dilleber* agt. *Home L. Ins. Co.*, 69 *N. Y.*, 257.)

Appearance of foreign corporation by attorney when waiver of objection that court had no jurisdiction. (*See Ward* agt. *Roy*, 69 *N. Y.*, 96.)

Defect in parties plaintiff not taken by answer or demurrer will be deemed to have been waived and cannot be taken on trial. (*See Davis* agt. *Beckstein*, 69 *N. Y.*, 440.)

WARRANTY.

See COMPLAINT.

Brown agt. *Brockett*, ante, 32.

See INSURANCE (FIRE).

Lasher agt. *Northwestern National Ins. Co.*, ante, 318.

WATER.

1. The ponder of waters has a right to make any use thereof which is not inconsistent with the rights of owners below. This right of use which may be to propel machinery, for domestic purposes, for sale and for hire, is *property* of which the owner cannot be deprived. (*Myer* agt. *Whittaker*, ante, 376.)

2. So long as owners below are not interfered with a party who is the former and owner of the pond or basin which holds the water has the right to use such water for his own profit. He can use its momentum to propel machinery and let that right to others; he can use the water for domestic and farm-

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ing purposes, and can let, rent and sell that right to others. (*Id.*)

3. The right to use and to sell the water in its *liquid form* is only a part of his right. The ice made from the waters of the pond is so far the absolute *property* of the owner of the pond that he can sell or dispose of it as he could the trees or timber on his farm. (*Id.*)
4. The case of *Marshall agt. Peters* (12 *How.*, 218) commented on, and the doctrine therein announced dissented from. (*Id.*)
5. One S., at the time of the occurrence of the events out of which this suit originated, was and is now the owner of the land upon which the dam rests, and also was the owner of all the land covered by the waters of the pond, except a small part which belonged to O. O., by deed, conveyed to the grantor of S. "the right, privilege and liberty to overflow so much of the said lands above mentioned as are now, or at any time after may be, overflowed by means of the said dam, or by any other dam which may be erected in place of said dam." In February, 1876, M. and R., of which the plaintiff is the survivor, purchased all the ice in the pond, formed or to be formed, from S. Previous to the gathering of the ice from the pond a freshet occurred which carried out of the pond a large part of the ice formed therein and loosened that which is in controversy in this action from the shore, and would probably have swept this out also had not plaintiffs, by holes cut therein, fastened it to the shore and thus detained it. After plaintiffs had commenced to remove and gather the ice, the defendants went to the part of the pond, over O.'s lands, by permission of O. and cut a large quantity of ice thereon against the forbidding of the plaintiffs, and in spite of such forbidding opened a canal or channel across the pond, and

over that part of it which was upon the land to which S. had title, and floated the ice, so cut by them, through such canal or channel, and gathered and sold the same.

Held, that, an action for the recovery of the value of the ice so taken, could be maintained upon the ground alone, of the abstract right of the plaintiffs, obtained by the purchase from S.

Held, further, that, as after purchase the plaintiffs had, by their own exertions, saved the ice from being lost by anchoring it to the shore, and by labor performed thereon, they were in actual possession when the defendants took and converted it, and are, therefore, entitled to recover. (*Id.*)

WILL.

1. The heir at law of those in whose favor devises and bequests are made in a will, cannot maintain an action in equity for its construction; nor can those who claim in opposition to the dispositions of the will. Their remedy is legal, not equitable. (*Stinde agt. Ridgway, ante*, 801.)
2. Vesting of the legal title, in case of a devise in trust, considered (*Newell agt. Ridgway* [12 *Hun*, 604], *applied*). (*Id.*)
3. Where the testatrix and her two grandchildren were lost in a shipwreck, and it appearing that a wave bore the testatrix from the saloon in which the children were with her, and she was not seen afterwards alive, the grandchildren being seen alive a few minutes afterwards, when the saloon, with its inmates, was carried away: *Held*, that while from such facts it cannot be said to be absolutely certain that the testatrix died first, yet under the case of *Pell agt. Ball* (1 *Chaves Eq.* [S. C.], 99), the evidence might justify such conclusion. (*Id.*)

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4. The burden of proving a survivorship rests upon the party who claims through it. (*Id.*)
5. Although, at common law, the father had the paramount right to the custody and control of his minor children, yet his power to make a *testamentary* disposition of their guardianship, is derived exclusively from the *statutes*. (*Thomson* agt. *Thomson et al.*, ante, 494.)
6. The provisions contained in section 6 of the act of April 10, 1862, declaring that no man shall create any testamentary guardianship of his child, unless the mother, if living, shall, *in writing*, signify her assent thereto, is repealed by chapter 32, Laws of 1871, page 89. (*Id.*)
7. The amendment of 1871 covering the subject-matter, was intended to dispense with the consent of the mother to a testamentary appointment by the father, and to reinstate the father in his unqualified right to appoint a testamentary guardian for his minor child, as it existed under the Revised Statutes of 1830, part 2, chapter 8, title 8, section 1. (*Id.*)
8. When the provisions of two statutes are manifestly repugnant, the earlier enactment is impliedly modified or repealed (*In addition to the cases cited below, vide People ex rel. Ross* agt. *The City of Brooklyn*, 69 N. Y., 605; *People ex rel. Canj. Nat. Bank* agt. *Bd. Suprs. Mont. Co.*, 67 N. Y., 109). (*Id.*)
9. Where a testator devised to the executors, &c., of his will all his real estate in trust, to sell the same whenever they should deem a sale thereof expedient and proper; to collect the rents, issues and profits thereof; to repair and improve the same out of his personal estate, and the rents of his real estate, or the proceeds of the real estate sold, and generally to manage, control and dispose of the same as they shall see fit, and they were authorized in their discretion to lease or purchase, in their own name, residences to be used and occupied until the death of his wife:
Held, that the executors were vested with the legal title to the estate; that the intention to clothe them with the legal title is shown by the express words of gift, and the duties and responsibilities imposed. (*Id.*)
10. When the testator declared that all the rest, residue and remainder of his estate, after the payment of debts and legacies, should be equally divided among his wife and children, as is thereafter in the will provided, and afterwards in the will directed that one-quarter of the proceeds of such sale of his real estate should be paid over to his wife, and the remaining three-quarters to be equally divided among his children, share and share alike, the executors were directed to invest the three-quarters upon bond and mortgage, and to pay over the income and profits to the guardians of his children for their support and maintenance.
Held, that it was the intention of the testator that the power of sale should be exercised within the lifetime of his widow, and that the trust as to her share would terminate at her death. (*Id.*)
11. That, until a sale of the real estate, the widow should receive her proportion of the rents and profits from the trustees, and that the children's portion should be paid to the guardians; the same persons being constituted trustees and guardians under the will. (*Id.*)
12. Also, *held*, that the trust in the executors, which was not to continue beyond the life of the beneficiary, was valid. (*Id.*)
13. When there are no words of gift except as involved in the words "equally divided among," these words sufficiently dispose of the

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interest intended to be disposed of (*Clancy* agt. *O'Gara*, 4 *Abb. N. C.*, 268, 271). (*Id.*)

14. Where a testator gave to his three minor children certain portions of his estate, to be paid to them when they should severally attain the age of twenty-one years, and provided that in case of the death of either child before arriving at the age of twenty-one, years without issue, the share to which the child so dying shall be entitled, shall go to the survivors or survivor of the children and the issue of a deceased child, and afterwards in the will gave to his brothers and sisters the shares of his children, in the event that they should all die without issue, before arriving at the age of twenty-one:

Held, that, as the consummation of the gifts to the brothers and sisters of the testator depended upon the termination of more than two lives in being at the death of the testator, they are illegal and void; but that the provisions in favor of the brothers and sisters could be dropped, without disturbing the valid disposition of the will. (*Id.*)

WITNESS.

1. In this action, brought for a partnership accounting, the defendant claimed that the accounts had been settled by an accord and satisfaction. The parties themselves were the principal witnesses and gave contradictory evidence. The defendant, to impeach plaintiff's testimony denying the settlement, gave evidence to show that at the time of the settlement, plaintiff thought that defendant's father, a man of wealth, intended to leave his property to defendant in trust and not absolutely; and that subsequently, upon learning that the property was left to defendant absolutely, so that defendant was pecuniarily responsible, he denied the settlement. Upon the trial the plaintiff offered to prove by a witness that he had denied that any settlement had been made before he knew the contents of the will of defendant's father. *Held*, that the evidence was proper as tending to show that the plaintiff had denied the settlement, at a time when he could not have been impelled so to do by a knowledge of the change in defendant's pecuniary condition. Where an attempt is made to discredit a witness on the ground that when his testimony is given his interests prompt him to make a false statement, he may show that he made similar statements at a time when he had no advantage to derive from so doing. (*Herrick* agt. *Smith*, 13 *Hun*, 446.)
2. A witness may be contradicted not only as to his testimony in chief, but also as to matters drawn out on his cross-examination, material to the issue, especially when the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination. (*Greenfield* agt. *People*, 13 *Hun*, 242.)
3. In reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power, and it is its duty, to pass upon the facts *de novo*, from the evidence adduced before the court below. (*Id.*)
4. Since the passage of the act of 1873, by which challenges both for principal cause and for favor are to be tried by the court it is not necessary to reiterate, upon the challenge for favor, the evidence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges. (*Id.*)
5. Where, upon a challenge for favor, it appeared that the person challenged had a preconceived im-

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- pression as to the guilt of the accused, based upon statements which he had read in an account of a former trial, which statements might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, *held*, that the challenge was properly overruled. (*Id.*)
6. Upon the trial of an action for assault and battery, the defendant having called several witnesses who testified to the bad character of the plaintiff, a milliner, who had testified in her own behalf, she was recalled and asked: "How was it as to the better class of ladies in the village patronizing you up to that time?" *Held*, that the question was improper, and that the court erred in allowing it to be put and answered against the objection and exception of defendant's counsel. (*Hagadorn agt. Kearney*, 13 *Hun*, 236.)
 7. An action was brought upon a promissory note made by the defendant Warner, to the order of and indorsed by one Ayer, and subsequently indorsed by one Alexander, and by him transferred to the plaintiff. Alexander died before the trial. The signatures of the maker and indorsers were proved. Ayer was called by the defendants, the legal representatives of Warner, and against plaintiff's objection and exception allowed to testify as to a personal transaction between himself and Alexander, tending to establish the defense of usury. *Held*, that Richardson was an "assignee" of Alexander, within the meaning of section 399 of the Code. That Ayer was a person "from, through or under whom" Richardson derived title within the meaning of that section. That the fact that the defendants, the legal representatives of Warner, by whom Ayer was called, did not derive title from him, did not render him competent. That the evidence should have been excluded. (*Richardson agt. Warner*, 13 *Hun*, 13.)
 8. Under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, the witness would have been competent, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. (*Id.*)
 9. Under the provisions of the Revised Statutes (2 *R. S.*, 681, *sec.* 1), disqualifying, thereafter as a witness, any person who "shall upon conviction, be adjudged guilty of perjury," a person is not rendered incompetent until, by judgment, sentence has been pronounced upon him; a verdict of guilty alone is not sufficient. (*Blawfus agt. People*, 69 *N. Y.*, 107.)
 10. Information as to the condition of the insured acquired by a physician, while attending upon him, which was necessary to enable the physician to prescribe, he is prohibited from disclosing (2 *R. S.*, 406, *sec.* 73), and he is incompetent as a witness to testify thereto. (*Dilleber agt. Home L. Ins. Co.*, 69 *N. Y.*, 256.)

WRITTEN INSTRUMENT.

1. It is competent for a party to show any facts and circumstances surrounding the making of a contract, which would enable the jury to determine the subject-matter to which the contract was in fact applicable. (*Bickett agt. Taylor*, *ante*, 126.)
2. It is an elementary rule of construction that every written instrument should be interpreted in the light of the circumstances sur-

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rounding its execution, and it is error for the court to exclude evidence of the circumstances under which the instrument was executed. (*Id.*)

8. It is only where there is no evidence in law, which, if believed, will sustain a verdict, that the court is called upon to nonsuit. (*Id.*)

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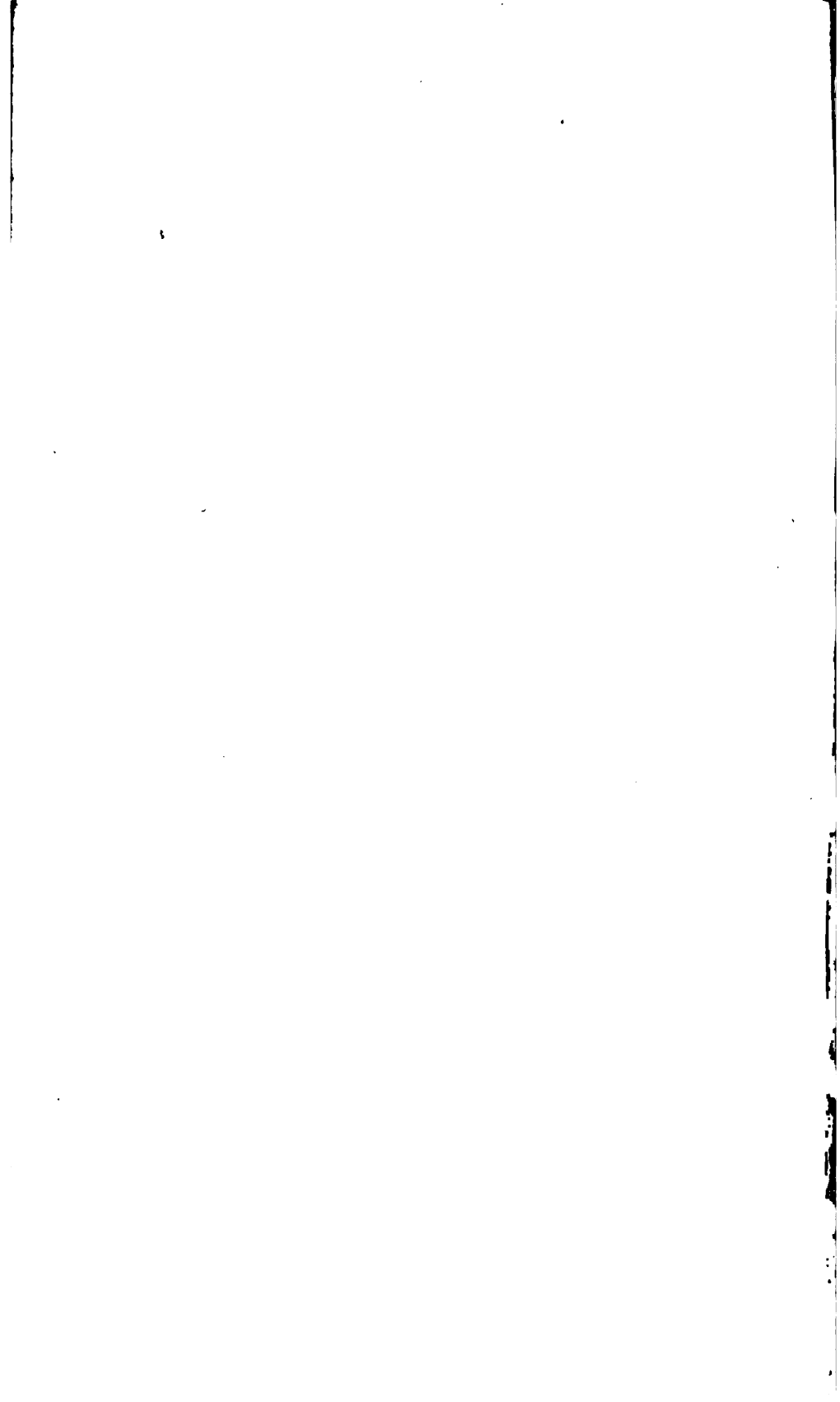
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A. R. C.









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